SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 790.

THE UNITED STATES AND INTERSTATE COMMERCE COMMISSION, APPELLANTS,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

INDEX.

b (Cover:) No. 38. November Term, 1915. In the District Court of the United States for the Western District of Pennsylvania. In equity. The Pennsylvania Railroad Company, complainant, vs. The United States of America, defendant. Petition. Patterson, Crawford & Miller, Solicitors and counsel for complainant. Filed July 3, 1915, J. Wood Clark, clerk.

1 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, complainant, *vs.* THE UNITED STATES OF AMERICA, DEFENDANT.	In Equity. Term, 1915. No. .

PETITION.

To the Honorable the Judges of the said court:

The Pennsylvania Railroad Company, a corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, brings this, its petition, against The United States of America.

And thereupon your orator complains and says:

1. That it is a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, having been incorporated by an act of the General Assembly of that
2 Commonwealth approved April 13th, 1846, entitled "An act to incorporate the Pennsylvania Railroad Company," and is a common carrier by railroad, possessed of all and every the corporate rights, privileges, and franchises conferred by said act and by divers other acts supplementary thereto and amendatory thereof. That its principal operating office is located in the city of Philadelphia, in the State of Pennsylvania.

2. That the Crew-Levick Company is a business corporation organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, engaged in the business of refining crude oil, and having its residence and principal office in the city of Warren and State of Pennsylvania, within the limits of the Western District of Pennsylvania.

3. That on or about the 26th day of February, A. D. 1913, the said The Crew-Levick Company filed a certain petition before the Interstate Commerce Commission of the United States against the complainant herein, the same being docketed on the docket of the said Interstate Commerce Commission as docket No. 5574, Sub No. 1, a copy of which petition is annexed hereto, marked "Exhibit A," and is made part hereof.

4. That by the said petition the said The Crew-Levick Company sought to obtain an order from the Interstate Commerce Commission requiring the Pennsylvania Railroad Company, complainant herein,

to furnish to it the said The Crew-Levick Company, tank cars for the transportation in interstate commerce of oil refined at its refinery at Warren.

5. That to the said petition your orator filed an answer before the said Interstate Commerce Commission, denying any obligation on its part under the interstate commerce act, or under the law generally, to furnish vehicles of any specified description, and in
3 particular tank cars, for the transportation in interstate commerce of oil refined by the said The Crew-Levick Company at its refinery at Warren, but averring full performance on its part of all its lawful duties in connection with the furnishing of transportation facilities to the said The Crew-Levick Company. A copy of this answer, marked "Exhibit B," is annexed hereto and is made a part hereof.

6. That thereafter, to wit, on or about the 22d day of October, A. D. 1913, the Pennsylvania Railroad Company, your orator herein, filed with the Interstate Commerce Commission its motion to dismiss the complaint for the reason, as stated in the said motion, that the Interstate Commerce Commission was without jurisdiction to entertain the complaint or to grant the relief prayed for. A copy of the said motion is hereto attached, marked "Exhibit C," and made part hereof.

7. That thereafter, to wit, on or about the 19th day of November, A. D. 1913, a hearing was held before the Interstate Commerce Commission at Buffalo, New York, at which hearing testimony was taken on behalf of the said The Crew-Levick Company, and on behalf of the Pennsylvania Railroad Company, your orator herein. That at the same time, and conjointly with the testimony in the said proceeding, and by agreement between the parties, testimony was taken in a similar proceeding brought against your orator by the Pennsylvania Paraffine Works, the said proceeding being known on the docket of the Interstate Commerce Commission as docket No. 5574.

8. That thereafter, to wit, on the 11th day of March, A. D. 1914, briefs having been filed by both parties to the proceeding brought by the Pennsylvania Paraffine Works against the Pennsylvania Railroad, complainant herein, and to the proceeding brought by the Crew-Levick Company against the Pennsylvania Railroad
4 Company, complainant herein, the two cases were argued before the Interstate Commerce Commission at Washington, D. C., and submitted for decision.

9. That thereafter, to wit, on the 11th day of May, A. D. 1915, the Interstate Commerce Commission made a report and entered an order in the two proceedings above referred to, applicable severally and individually to each one, a copy of which report and order is hereto attached, marked "Exhibit D," and made a part hereof. The order entered by the commission is in the following language, to wit:

"It is ordered, That the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist, on or before August 15, 1915, and thereafter to abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the act to regulate commerce and amendments thereto.

"It is further ordered, That said defendant be, and it is hereby, notified and required to provide on or before August 15th, 1915, and thereafter to furnish, upon reasonable request and reasonable notice at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

"And it is further ordered, That this order shall continue in force for a period of not less than two years from the date when it shall take effect.

"By the commission.

"GEORGE B. MCGINTY,
[SEAL.] "*Secretary.*"

10. That the Pennsylvania Railroad Company, complainant herein, is advised by counsel and therefore avers, that neither the act of Congress to regulate commerce commonly known as the interstate commerce act, nor any other law, imposes on the complainant the obligation to supply tank cars for the transportation of petroleum, and that the order of the Interstate Commerce Commission, entered in the proceedings heretofore referred to and quoted above in this petition, is without lawful warrant.

11. That the Pennsylvania Railroad Company, complainant herein, is advised by counsel and therefore avers that neither the act of Congress to regulate commerce, commonly known as the interstate commerce act, nor any other law confers upon the Interstate Commerce Commission authority to make the order referred to and quoted above in this petition.

12. That the Pennsylvania Railroad Company, complainant herein, is advised by counsel and therefore avers that neither the act of Congress commonly known as the interstate commerce act nor any other law authorizes the Interstate Commerce Commission in a proceeding of the character heretofore referred to in this petition as depending before it between the Crew-Levick Company and the Pennsylvania Railroad Company to make the order referred to and quoted above in this petition.

13. That the order of the Inter-state Commerce Commission entered in the proceeding heretofore referred to and quoted above in this petition assumed to require your orator to furnish to the said The Crew-Levick Company tank cars for the through transportation of shipments of petroleum in interstate commerce not only when consigned to points on the line of railroad of this complainant but also

when consigned to points on the lines of railroad of other railroad companies; and the Pennsylvania Railroad Company, complain-
6 ant herein, is advised by counsel and therefore avers that the said order is in this regard without lawful warrant and contrary to the fifth amendment to the Constitution of the United States.

14. That the order of the Interstate Commerce Commission entered in the proceeding heretofore referred to and quoted above in this petition, assumes to require your orator to furnish to the said The Crew-Levick Company tank cars for the through transportation of shipments of petroleum in interstate commerce when such cars happen to be on the railroad of this complainant, whether or not such tank cars are owned by this complainant or by other railroad companies or by private individuals; and the Pennsylvania Railroad Company, complainant herein, is advised by counsel and therefore avers that the said order is in this regard without lawful warrant and is contrary to the provisions of the interstate commerce act; and that obedience thereto on the part of this complainant would subject it to actions for damages on the part of the owners of such cars and to liability in such actions, and that the said order is therefore unlawful and contrary to the provisions of the fifth amendment to the Constitution of the United States.

15. That the order of the Interstate Commerce Commission entered in the proceeding heretofore referred to and quoted above in this petition deprives your orator of its property without due process of law in this, that the time allowed for compliance with the order of the said commission is insufficient to enable this complainant to build tank cars for the transportation in interstate commerce of the shipments of petroleum of the said The Crew-Levick Company and is insufficient to permit it to arrange to acquire such cars or to obtain the use thereof from the present owners thereof on reasonable terms, since such owners are under no compulsion to sell such cars or to rent them to this complainant upon reasonable and just
7 terms. The Pennsylvania Railroad Company, complainant herein, is accordingly advised by counsel and therefore avers that the order of the commission is in this regard without lawful warrant and is in violation of the fifth amendment to the Constitution of the United States.

16. That the Pennsylvania Railroad Company, complainant herein, is advised by counsel and therefore avers that the order of the Interstate Commerce Commission hereinbefore referred to and quoted in this petition is uncertain and indefinite and without warrant in law.

17. That the said unlawful order of the said Interstate Commerce Commission, made and promulgated as aforesaid in the assumed exercise of authority unlawfully claimed by the commission under the said act, will, unless the same be enjoined and set aside, annulled, and suspended by your honorable court, subject your orator to a multiplicity of suits for heavy penalties and a multiplicity of suits for the enforcement of the said order under the provisions of the

said act, and will produce irreparable damage to your orator, the complainant herein.

18. Your orator further shows that if it should be required to comply with the said order, even temporarily, pending final adjudication thereof of its lawfulness, your orator would be without means of reparation for the loss to which it would be thereby unlawfully subjected. In consideration whereof, for as much as your orator is remediless in the premises, at or by the strict rule of common law, and is only relievable in a court of equity where matters of this kind are properly cognizable and reviewable under the act heretofore mentioned, your orator prays that a preliminary or interlocutory order or injunction be entered restraining and suspending the order of the said Interstate Commerce Commission until the final determination
8 of this cause, and that upon the final hearing of this suit a decree be entered herein enjoining, setting aside, annulling, and suspending the said order of the Interstate Commerce Commission and enjoining the enforcement of the said order.

Your orator further prays that your honors will direct that a copy of this petition be forthwith served by a marshall or deputy marshall in the manner provided in the act of Congress to regulate commerce.

And your orator will ever pray, etc.

Solicitors and Counsel for the Pennsylvania Railroad Company.

9 COMMONWEALTH OF PENNSYLVANIA,

City of Philadelphia, ss:

Before me, the subscriber, a notary public in and for the county of Philadelphia, residing in the city of Philadelphia, personally appeared the undersigned, who, being duly sworn by me according to law, deposes and says that he is vice president of the Pennsylvania Railroad Company, the above complainant, that he has read the said petition, and that the same is true of his own knowledge except such matters as are therein stated on information and belief, and that as to such statements he believes it to be true.

Sworn to and subscribed before me this day of June, A. D. 1915.

10 EXHIBIT A.

United States of America, Interstate Commerce Commission.

THE CLEW [CREW]-LEVICK COMPANY VS. THE PENNSYLVANIA RAILROAD COMPANY.

Interstate Commerce Commission. Docket No. 5574. Filed Feb. 26, 1913. Sub. No. 1.

The petition of the above-named complainant, the Clew [Crew]-Levick Company, respectfully shows:

(1) That the Clew [Crew]-Levick Company is a business corporation organized, created, and existing under and pursuant to the laws

of the State of Pennsylvania, and as such owns and operates as a part of its business the Glade Oil Works, so called, at or near Warren, in the State of Pennsylvania, and the said Clew [Crew]-Levick Company is and for the several years last past has been engaged in the business of refining oils and the products thereof at its said plant, and your complainant has during all of said time carried on and operated its said business at or near Warren, Pa., as aforesaid, and shipped and delivered the products of said refinery and all transactions hereinafter set forth under the name of the Glade Oil Works, and your complainant has during such time had its office at said refinery for the transaction of business of said Glade Oil Works at or near Warren, Pennsylvania, and during all such time William Muir has been and still is the general manager of the said Glade Oil Works, and said Glade Oil Works refines for ship-
11 ment about 400,000 gallons of refined oil and gasoline per month and also refines for shipment and transportation about 200,000 gallons of light and dark lubricating oil per month at its said plant and refinery at Warren, aforesaid, and expects to so continue to refine about 400,000 gallons of refined oil and gasoline and about 200,000 gallons of light and dark lubricating oil each and every month during the ensuing year and for each and every year thereafter for shipment and transportation, and that said company in its business of shipping oils and gasolines aforesaid ships and delivers the same at divers points and places throughout the United States, and particularly in the States of Pennsylvania, New York, New Jersey, Ohio, Maryland, Illinois, Indiana, Michigan, and Delaware, as well as the Eastern and Southern States, some or all of them, and said company expects to be during all the ensuing year and for a long time thereafter engaged in interstate commerce business in so selling and delivering said products of said refinery as aforesaid.

(2) That the Pennsylvania Railroad Company is a transportation corporation duly organized and created under and pursuant to the laws of the State of Pennsylvania, and that the said Pennsylvania Railroad Company is and for many years last past has been and still is engaged among other things in transporting freight and passengers by railroad for hire during all said time, and has been and still is a common carrier engaged in transporting freight in the various States of the United States, and as such common carrier during all the times herein mentioned received and delivered freight as a common carrier and is still engaged as such common carrier in receiving and delivering freight for hire throughout the United States in said interstate commerce business as such common carrier, and as such common carrier is subject to the provisions of the act to regulate commerce, approved February 4, 1887, and the acts amendatory thereof and supplementary thereto.

(3) Your complainant further shows that said Clew [Crew]-
12 Levick Company maintains switches and sidings in connection with the Pennsylvania Railroad, and that such sidings are connected with the trackage of said Pennsylvania Railroad Company,

and that complainant has ample sidings and switches at and about its said plant at or near Warren, Pa., aforesaid, on which the cars of the said Pennsylvania Railroad can be filled with the products of said refinery, as aforesaid, by running the same into said cars from the tanks of said Clew [Crew]-Levick Company, and said complainant has ample, adequate, and efficient appliances at said Glade Oil Works to fill said cars from said tanks, and that said complainant has ample sidings at its said plant, the Glade Oil Works, for the storage of tank cars for its business, and that the lines and trackage of the said Pennsylvania Railroad Company run from and are maintained from said sidings aforesaid at or near Warren, Pa., through the various States of the United States wherein the said Pennsylvania Railroad Company so operates its lines and trackage aforesaid.

(4) That the Pennsylvania Railroad can by reason of its location and trackage and on account of the location of the customers of complainant, better and more directly serve and deliver the products of your complainant's refinery at or near Warren, Pa., to its said customers than any other transportation company or corporation for the reason that the lines, trackage, and railway of said Pennsylvania Railroad Company run and reach the several points and places where your complainant is requested to and does deliver its oils, gasoline, and the products of its refinery at or near Warren Pa. That with proper and efficient methods and fair service on the part of said railroad company, substantially, all the products of such refinery would and should be transported over the lines of said Pennsylvania Railroad Company.

(5) Your complainant further shows that it is the owner of a considerable number of tank cars, to wit, fifty-seven tank cars, each of which range from 4,500, 6,000, and 8,000 gallons holding capacity,
13 which tank cars are used for the transportation of oils and gasoline so manufactured by your complainant, aforesaid, in bulk. That by the regulations and practice of said Pennsylvania Railroad Company the wear and tear of said cars and the defects and breakage due to defects occurring while in use are repaired by said Pennsylvania Railroad Company at the expense of complainant. That said railroad company by such regulations and practice agreed to make repairs for breakage occurring by rough handling, wrecks, and accidents for which the carrier is directly responsible. That such damage and injury to the cars of your complainant and the amount of such damages are ascertained by the Pennsylvania Railroad Company by the inspectors thereof.

(6) Complainant further alleges that the defendant, the Pennsylvania Railroad Company, has violated the act to regulate commerce of the United States of America and the acts amendatory thereof and supplementary thereto in the following particulars: That the said Pennsylvania Railroad Company upon reasonable request wholly failed and neglected and refused to furnish cars, vehicles, and instrumentalities and facilities for the transportation, carriage,

and shipment in bulk of the products of your complainant in failing and refusing to furnish and provide tank cars, vehicles, and instrumentalities and facilities in connection therewith for the transportation of 400,000 gallons of refined oil and gasoline per month, and to furnish and provide suitable tank cars and vehicles with the necessary and proper instrumentalities and facilities in connection therewith for the transportation in bulk in said tank cars of 200,000 gallons of light and dark lubricating oil during each and every month at its said plant at or near Warren, Pa., aforesaid.

(7) Your complainant further alleges that said Pennsylvania Railroad Company has violated the act to regulate commerce aforesaid in that in the month of November, 1912, your complainant caused notices in words and figures as follows, to wit:

14 "You will please take notice that the Glade Oil Works, of Warren, Pennsylvania, require a sufficient number of tank cars to ship 400,000 gallons of refined oil and gasoline per month, and a sufficient number of tank cars to ship 200,000 gallons of light and dark lubricating oil per month from the plant of said Glade Oil Works at Warren aforesaid during the ensuing year, and that such cars are needed for a proportionate daily shipment from said works during all of said time. And you are hereby notified that said Glade Oil Works demand that said tank cars be so furnished on the siding and switches of said company. Dated November 11, 1912. The Glade Oil Works, by Wm. Muir, manager. To the Pennsylvania Railroad Company."

to be duly and personally served upon R. M. Patterson, of the Pennsylvania Railroad Company, in the city of Philadelphia, in the State of Pennsylvania, and on J. G. Rodgers, the general superintendent of the Buffalo & Allegheny Valley Division of said railroad company, and George B. Beale, superintendent of the Buffalo division of the Buffalo & Allegheny Valley division of said railroad company, also on E. W. Kinander, the agent of the Pennsylvania Railroad Company at Struthers, Pennsylvania, and a similar notice delivered personally to S. C. Long, general manager of the Pennsylvania Railroad Company, at his office in the city of Philadelphia, Pennsylvania.

(8) That your complainant further shows that heretofore, to wit, the 18th day of December, 1912, the said S. C. Long, general manager of the said Pennsylvania Railroad Company, answering the demand and request of your complainant to furnish tank cars as aforesaid and in conformity with said notice, refused to so furnish or increase the tank cars required by your complainant in words and figures as follows, to wit:

"We beg to say that the railroad company is not prepared
15 to increase its present tank-car equipment, but is prepared to transport the commodities in question when properly contained in barrels or other similar retainers at rates that are fair, reasonable, and nondiscriminatory. Yours, truly, S. C. Long, general manager."

(9 Your complainant further shows that said Pennsylvania Railroad Company has during the past several years and now is holding itself out to the public as ready and willing to carry goods and commodities for all persons, indifferently, for hire as such common carrier not only in the State of Pennsylvania but elsewhere throughout the United States of America on its established routes and holds itself out and advertises and it is a part of its business and long has been to transport oils and gasoline such as is produced and refined by your complainant in bulk for hire over its said road.

(10) Your complainant further alleges for the purpose of showing that said defendant is violating the act to regulate commerce that it is necessary that such refined oils and gasoline and light and dark lubricating oils so produced and manufactured at said refinery be transported in tank cars in bulk. That the expense of transporting such products in barrels and by other similar means or in retainers or containers such as is referred to in the letter and correspondence of the general manager of the Pennsylvania Railroad Company increases the expense of said transportation to such an extent that such expense is destructive of the business of shipping said commodities, and that in case the transportation of said oils and gasoline is made in wooden or iron barrels, then such barrels weigh nearly twenty-five per cent of the package when filled, hence adds 25% to the transportation charges. The cost of the package adds on the average in excess of 25% of the value of the commodity contained in it. The cost in time and in handling is greatly in excess of the cost of loading and unloading such commodities in bulk, and leakage and wastage is much greater in barrels and is minimized if transported in tank cars.

16 (11) Your complainant further alleges that the defendant, the Pennsylvania Railroad Company, has further violated the act to regulate commerce as follows, to wit: That the use of tank cars for the transportation of oil and the products of said refinery in bulk has become and now is an actual necessity without which the refiners of crude oil, to wit, your complainant, could not carry on business at a profit. That tank cars have been in use for a period of more than twenty-five years for transporting oils and gasoline and the products of such refining business and have been accepted by the Pennsylvania Railroad Company and by carriers generally when tendered for such transportation, and commercial conditions throughout the country have adjusted themselves to the transportation and delivery of oils and gasoline in bulk. Without the use of such tank cars by your complainant and others similarly engaged in refining crude oil, the cost of such refined products would be largely and vastly increased to the public and users thereof, and that the use of said tank cars has become an actual necessity and are in common use, and the transportation of said oils and gasoline by tank cars of the sizes hereinbefore described has become and is the common, usual, and ordinary method of transportation now in use, and is so recognized and adopted by the Pennsylvania Railroad as well as by

other carriers of said commodities in both their interstate and intrastate and local business, and that the Pennsylvania Railroad Company now owns about 500 tank cars and which it uses in part for the transportation of refined oils and gasoline in its business as such carrier, but that such number of cars and the cars so in use for the transportation of said commodities is wholly inadequate and insufficient for the business of transporting oils and gasoline ordinarily produced, and transported by the Pennsylvania Railroad Company, and by reason of the violation, refusal, and neglect of said Pennsylvania Railroad Company to so furnish tank cars provided with the usual and ordinary instrumentalities and facilities
17 for shipment and carriage of oil, it became necessary for the refiners and transporters of oils and gasoline for shipment, and especially of your complainant, to purchase and procure at great expense a large number of tank cars and other vehicles and instrumentalities for the shipment and transportation of their oils and gasoline, although your complainant alleges it is and during all of said times heretofore mentioned was and still is the duty of the said Pennsylvania Railroad Company, as such common carrier so engaged in interstate commerce business, to furnish and provide your complainant and others similarly situated with proper and sufficient tank cars and other vehicles and all instrumentalities and facilities for the shipment of said oils and gasoline so produced and manufactured by your complainant and the whole thereof, but said Pennsylvania Railroad Company has persistently neglected and refused so to do, and by means whereof and on account of said refusal to so furnish said cars, vehicles, and instrumentalities as aforesaid your complainant has suffered great damage, to wit, in the sum of $50,000.00 therefor.

(12) Your complainant further shows that it requires for the transportation of its products from sixty to one hundred tank cars and upwards per month during the past several years for the transportation of said oil and gasoline as aforesaid, so manufactured and produced by your complainant at its said refinery at or near Warren, Pa., aforesaid, depending upon the capacity of said cars, to wit: One hundred cars of 5,500 gallons capacity or sixty cars of 10,000 gallons capacity, and expects and intends to require a like number of cars during the ensuing year and during a long time thereafter, and your complainant requests and demands of said Pennsylvania Railroad Company to furnish such tank cars in conformity to such needs and requirements, but said Pennsylvania Railroad Company wholly refuses so to do and has continuously and persistently refused so to do during such time and has furnished not to exceed seven cars per month during the past seven months to the great and lasting
18 damage and injury to your complainant. That your complainant is not engaged in the business of a common carrier in transporting freight for hire in either local or interstate commerce, and your complainant was compelled to and did purchase and obtain at great expense a large number of tank cars, to wit: Fifty-seven tank

cars at about $1,200.00 each, for the transportation of the products of such refinery, and has been on account of such failure and refusal of said Pennsylvania Railroad Company to furnish and provide such cars in sufficient numbers obliged to provide, purchase, and obtain such tank cars to deliver the products of such refinery over said defendant railway company's roads as aforesaid in its own cars and vehicles, and when the said cars have been so shipped and used in the business of so transporting said oils and gasoline as aforesaid, the inspection by the Pennsylvania Railroad Company, as heretofore set forth, has been so expensive and unfair to your complainant that it unnecessarily and largely increased the cost of transportation thereof as hereinafter set forth.

(13) Your complainant further alleges that the defendant, the Pennsylvania Railroad Company, has further violated the act to regulate commerce in that the said railroad company in so transporting the products of said refinery over its said railroad in the cars of your complainant and in returning said cars to complainant; that said cars were damaged, injured, broken, and partially destroyed at divers times during the past several years, and which damage, injury, breakage, and destruction was not due to the ordinary wear and tear of said cars, but was caused and occurred by rough and unusual handling, wrecks, etc., for which said railroad company was directly responsible, yet the said Pennsylvania Railroad Company by its inspection and determination of the damages of your complainant by said railroad company has during all of said time been so uniformly unfair and unreasonably prejudicial to the interests of your complainant during the past several years that said
19 cars of your complainant were broken and greatly damaged by such rough handling, wrecks, and accidents occurring without any act or omission of your complainant, the inspection of such carrier as a general rule was unfairly ascertained and determined, that such damage, breakage, and injury to said cars was in no way attributable to the said Pennsylvania Railroad Company, but was chargeable to your complainant, and that such charges and inspection resulted in the destruction of such tank cars and large expense to your complainant for repairs, to be borne by your complainant and not by the carrier, the Pennsylvania Railroad Company, which largely, unduly, and uniformly increased the cost and expense of transporting the products of such refinery, and that as a result of such unfair and unreasonable inspection and determination by said defendant's inspectors, the cost of the products of your complainant's refinery was unduly and unfairly increased thereby.

(14) Your complainant further charges that the defendant violated the act to regulate commerce in the following particulars, to wit: That the said defendant during the last several years and divers times therein, to wit, several times during each month during all of said time, unduly and unnecessarily delayed the transporting of the tank cars of your complainant in the delivery thereof from the place of shipment at or near Warren, Pa., to the several places

where such cars were to be transported to and unnecessarily and unreasonably delayed the return of said empty cars from the places of delivery of said refined products at or near Warren, Pa., aforesaid, and great delays were occasioned thereby to the damage and detriment of your complainant, and your complainant on account thereof was unable to sufficiently or properly utilize its tank cars for the transportation of its oils and gasoline so refined at its said refinery, and such delay resulted in great injury, detriment, and damage to your complainant, and such delays were also vexatious and inimical to the success of your complainant's business. That
20 by reason and on account of such delay in the transportation of said cars as aforesaid, and by reason of such unfair and unreasonable inspection as aforesaid and said unreasonable and prejudicial determination of the damages so sustained by injury to the cars of your complainant as aforesaid, your complainant has been during the past several years and upwards compelled to ship and transport a part of the products of said refinery by and through other transportation lines by indirect and circuitous routes, to wit, by and over the Dunkirk and Allegheny Valley Railroad Company and also by the New York Central, and which last-named railroad company could not so directly reach or serve the customers of said refinery of your complainant, and the said lines of railways above set forth do not reach or run to the places where your complainant desires to deliver the products of said refinery, and the said railroad companies last above named run through divers other States besides the State of Pennsylvania; but the inspection and adjustment of damages to the tank cars of your complainant was more uniformly and honestly made and the delivery of oils and gasolines more rapidly made by said railroad companies last above named, to wit: The Dunkirk and Allegheny Valley Railroad Company and the New York Central lines, and the tank cars of your complainant were by said last-named companies returned in due time and without any unnecessary delay, with but few exceptions.

(15) Your complainant further alleges that it is the duty and obligation of said Pennsylvania Railroad Company, as such common carrier, as your complainant is informed and believes, to furnish and provide it with suitable, efficient, and ample vehicles, with the necessary instrumentalities and facilities therefor, for the transportation of the products of your complainant's refinery as aforesaid in conformity with the demands so heretofore made to said railroad company to furnish such transportation to it therefor in the amounts hereinbefore set forth and contained in said notices so served on said railroad company, but said railroad company
21 has wholly failed and neglected to perform said duties and obligations so resting upon it under and pursuant to the laws and statutes of the United States, and particularly of the act to regulate commerce and the various sections thereof.

(17) That no previous application has been made for an order or direction requiring the said Pennsylvania Railroad Company to

furnish and provide such vehicles, instrumentalities, and facilities as aforesaid to your complainant.

Wherefore your complainant prays that the defendant may be required to answer the charges herein, and that after due hearing and investigation an order may be made commanding the defendant to cease and desist the said violations of the act to regulate commerce, and that the said defendant shall be required to furnish the necessary transportation pursuant to the prayer of your complainant herein and in conformity to the act to regulate commerce and the acts amendatory thereof and supplementary thereto, and for such other and further order as the commission may deem necessary in the premises, and your petitioner will forever pray, etc.

Dated February 20, 1913.

THE CLEW [CREW]-LEVICK CO.,
By WM. MUIR, *General Manager.*
By GEORGE E. SPRING,
Its Attorney, Office and P. O. Address at Franklinville, N. Y.

22 STATE OF PENNSYLVANIA,
County of Crawford, city of Titusville, ss:

William Muir, being duly sworn, deposes and says that he is the general manager of the Clew [Crew]-Levick Company named in the foregoing petition subscribed by him; that he knows the contents thereof and the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters he believes it to be true.

WM. MUIR.

Sworn and subscribed before me this 20th day of Feb., 1913.

HARRY GERSON,
Notary Public.

Commission expires Jan. 21, 1917.

23 EXHIBIT B.

Before the Interstate Commerce Commission.

THE CLEW [CREW]-LEVICK COMPANY VS. THE PENNSYLVANIA RAILROAD COMPANY.

Docket No. 5574. Sub-No. 1.

DEFENDANT'S ANSWER.

The above-named defendant, for answer to the complaint filed in this proceeding, respectfully states:

I. This defendant admits that the complainant has been and is engaged in refining oil and the products thereof at or near Warren, Pennsylvania, and that it has shipped and continues to ship its

products in interstate Commerce, but it is without sufficient information to admit or deny the averments of paragraph one as to the volume of the complainant's business and the other averments of this paragraph and accordingly prays that so far as the same be deemed material complainant be required to make due proof thereof.

II. This defendant admits that it is a common carrier engaged in part in interstate commerce, and that as to such commerce it is subject to the act to regulate commerce approved February 4th, 1887, and the acts amendatory thereof and supplementary thereto, so far as the same are constitutional and enforceable.

III. This defendant admits that it has siding connections at Warren, Pennsylvania, with the works of the complainant, but as to whether these sidings are ample for the purpose of the complainant referred to in paragraph three of the complaint, and as to whether the complainant has ample, adequate, and sufficient appliances
24 at its refinery to fill cars from its tanks, this defendant is without sufficient information either to admit or deny, and accordingly prays that so far as those facts may be deemed material complainant may be required to make due proof thereof.

IV. This defendant is not disposed to deny that it can better and more directly serve and deliver the products of the complainant's refinery, than can other transportation companies, but it is unable to make any averment in regard to this allegation of paragraph four of the complaint since it is without information as to the facilities of its competitors, and it is therefore unable to make comparisons. It denies that it has failed to provide proper and efficient methods and fair service, but on the contrary avers that it has performed fully and continues to perform fully its legal duties to the complainant in this regard.

V. This defendant admits that the complainant is the owner of certain tank cars, and that these cars are from time to time transported over the lines of this defendant, but it is without information to enable it to admit or deny the allegations of paragraph five of the complaint with reference to the precise number of these cars, and their respective capacities. Repairs to these cars which become necessary by wear and tear or by defects and breakage are paid for in some instances by the railroad company and in some instances by the complainant, the cause of the necessity for the repairs determining the party responsible for the expenses thereof. The averments of paragraph five of the complaint with reference to the parties responsible for these repairs is not stated with entire precision, but is substantially correct.

VI. This defendant denies that it has wholly failed and neglected and refused to furnish cars to the complainant for the shipments of its products in bulk, and denies further that it has in any regard violated its legal obligations to the complainant in this respect.

VII. This defendant denies that it has violated the act to
25 regulate commerce as alleged in paragraph seven of the complaint, and avers on the contrary that the allegation that it

did so by reason of the service on it by the complainant of certain notices referred to in the said paragraph seven is frivolous and immaterial.

VIII. This defendant admits that its general manager, S. C. Long, under date of December 18th, 1912, wrote the complainant in the manner and form referred to in paragraph eight.

IX. The averments of paragraph nine of the complaint are admitted subject to the qualification of Rule 29 of the official classification No. 39, a portion of which reads as follows:

"In providing ratings in this classification for articles in tank cars, the carriers whose tariffs are covered by this classification do not assume any obligation to furnish tank cars."

X. This defendant denies that it is violating the act to regulate commerce as alleged in paragraph ten of the complaint. With regard to the remaining averments of paragraph ten, it is without sufficient information to enable it to admit or deny the same and accordingly prays that due proof thereof be made by the complainant.

XI. This defendant admits that it owns approximately five hundred tank cars, but it denies that it is under any obligation to increase this class of its equipment, or that it has failed in its legal duties under the act to regulate commerce. It denies that it has failed to furnish adequate facilities as required by the act to regulate commerce, but on the contrary avers that it has fully performed its legal duties in this regard. It denies that the complainant is entitled to recover any damages from it on account of the matters alleged in this complaint. With respect to the other averments contained in paragraph eleven of the complaint, this defendant is without sufficient information to enable it either to admit or deny the same, and accordingly prays that so far as the same be deemed material due proof thereof be required.

26 XII. This defendant is without sufficient information to enable it either to admit or deny the extent of the volume of the complainant's business as alleged in paragraph 12 of the complaint. It denies that it has failed to furnish adequate facilities for the transportation of such portion of the complainant's traffic as has been duly offered to it for transportation. This defendant denies further that the complainant was compelled to purchase any tank car equipment because of any failure on the part of it, the defendant, to fully perform its legal duty under the act to regulate commerce. It denies further that the inspection established by it, The Pennsylvania Railroad Company, has been so expensive or unfair to the complainant as unnecessarily to increase the cost of transportation to the complainant.

XIII. This defendant denies that it has unfairly inspected the cars owned by the complainant and denies further that it has made unfair charges for the repairs necessary thereto. It denies further that there has been any unlawful action on its part which has unduly increased the cost of transportation to the complainant.

XIV. This defendant denies that it unreasonably or unduly delayed the transportation of the complainant's shipments, and denies further that it has subjected them or does subject them to any unfair or unreasonable inspection, or imposes upon the complainant any unjust charges for necessary repairs. It is without information as to the shipments alleged to have been made by the complainant over the Dunkirk & Allegheny Valley Railroad Company and also over the New York Central & Hudson River Railroad Company, and consequently it is unable to admit or deny the averments of the complaint with respect to the transportation service of these two companies. It accordingly prays that if these allegations be deemed material, due proof thereof be required.

XV. This defendant denies that it has failed to comply with the obligations imposed upon it by the interstate commerce act,
27 with respect to the furnishing of adequate facilities for the transportation of interstate freight, but on the contrary avers that it has fully performed its duties in the premises.

Wherefore this defendant prays that the complaint filed in this proceeding be dismissed.

THE PENNSYLVANIA RAILROAD COMPANY,
(Signed) By C. M. SHEAFFER,
General Superintendent of Transportation.
HENRY WOLF BIKLÉ,
GEORGE STUART PATTERSON,
Of Counsel.

28

EXHIBIT C.

Before the Interstate Commerce Commission.

THE CLEW [CREW]-LEVICK COMPANY VS. THE PENNSYLVANIA RAILROAD COMPANY.

Docket 5574. Sub No. 1.

MOTION TO DISMISS FOR WANT OF JURISDICTION.

Comes now the Pennsylvania Railroad Company, the defendant above named, and respectfully moves the Interstate Commerce Commission to dismiss the complaint filed in this proceeding for the following reason:

The Interstate Commerce Commission is without jurisdiction to entertain this complaint or to grant the relief prayed for.

(Signed) HENRY WOLF BIKLÉ,
Attorney for the Pennsylvania Railroad Company.
PHILADELPHIA, PA., *October 20th, 1913.*

29

EXHIBIT D.

INTERSTATE COMMERCE COMMISSION.

No. 5574. Pennsylvania Paraffine Works v. Pennsylvania Railroad Company.

No. 5574 (Sub-No. 1). Crew-Levick Company v. Same.

Submitted March 11, 1914. Decided May 11, 1915.

1. This commission has the power to require carriers to furnish all necessary equipment, both ordinary and special, upon reasonable request. Vulcan Coal & Mining Co. v. I. C. R. R. Co., 33 I. C. C., 52.
2. The question of what is a reasonably adequate car supply is an administrative one of which this commission alone can take original jurisdiction.
3. A shipper's request for cars especially suited for the transportation of his products would not be reasonable if the cars must be prepared for shipment in a manner which is peculiarly within the technical knowledge of men connected with that industry, or if the movement of the commodity is a dangerous operation which can be safely performed only by men engaged in its production.
4. The shipment of petroleum products in tank cars does not call for such technical knowledge as would render unreasonable complainants' request that defendant furnish these cars.
5. From the standpoint of economy to the shipper, to the consumer, and the railroad, tank cars are the only proper cars to use in the shipment of petroleum.
6. One of the tests to be relied upon in determining the reasonableness of a shipper's request for cars is to be found in the volume of his shipments in the past, due allowance being made for the growth of his business.
7. All cars used by carriers, whether they be owned by the carriers themselves or leased from private car lines or from shippers, must be distributed without discrimination.
8. Whatever transportation service or facility the law requires a carrier to supply, it has a right to furnish. Atchison Ry. Co. v. U. S., 232 U. S., 199; Arlington Heights Fruit Exchange v. S. P. Co., 20 I. C. C., 106.
9. Defendant required to furnish a sufficient number of tank cars.

G. E. Spring and C. D. Chamberlin for complainants.
Henry Wolf Biklé for Pennsylvania Railroad Company.

REPORT OF THE COMMISSION.

MEYER, *Commissioner:*

These complaints, which are identical, are brought against the single defendant, the Pennsylvania Railroad Company. They allege that the defendant has refused to furnish tank cars upon the reasonable request of complainants, in violation of the act to regulate commerce. They also allege that complainants have been damaged by unreasonable delays in the return empty of complainants' privately owned tank cars, and by defendant's unfair determination of damages to such cars, outside of ordinary wear and tear. Complainants pray for an order requiring defendant to furnish cars, and for such further order as the commission may deem necessary.

Complainants are refiners of crude oil. The Pennsylvania Paraffine Works has its office and refinery at Titusville, Pa., and the Crew-Levick Company operates the Glade Oil Works at Warren, Pa. Both complainants are corporations, organized under the laws of Pennsylvania, and have been engaged in refining oil for over 20 years. For the past two years the Pennsylvania Paraffine Works has been refining about 20,000 barrels of crude oil per month and the Glade Oil Works from 15,000 to 16,000 barrels per month. During the 10 months of 1913 for which results are shown in tables submitted by complainants the shipments of the Pennsylvania Paraffine Works averaged over 750,000 gallons and the shipments of the Glade Oil Works over 500,000 gallons per month. Of the shipments made by the Pennsylvania Paraffine Works 91 per cent moved in tank cars, 1½ per cent in barrels loaded in cars other than tank cars, and 7½ per cent in pipe lines, while of the shipments made by the Glade Oil Works 86.8 per cent moved in tank cars, 4.7 per cent in barrels, and 8.5 per cent in pipe lines.

Approximately 250,000,000 barrels of crude oil are produced annually in the United States, and there are in the neighborhood of 100 companies engaged in refining oil. For a long time the bulk of the refined product has been shipped in tank cars, and at present 91 per cent of the refined oil produced in this country is transported in this manner. It was testified that defendant has been using such cars for the shipment of oil for over 25 years.

Complainants have ample sidings and connections with defendant's railway both at Titusville and at Warren for the delivery by defendant and the loading of tank cars. The tank cars now in common use for the transportation of oil have a capacity of from 6,000 to 12,000 gallons each. The cars are so constructed that they may be rapidly loaded at the refinery, and jobbers and dealers in the refined product throughout the country have the proper and necessary facilities for unloading tank cars by gravity at their various stations. Even the country grocer has his tank, which is filled from tank wagons. The tank wagons are filled from the oil dealer's storage tank, which in turn is filled from tank cars.

The only other method of transporting oil by rail is in barrels or similar containers loaded in box cars. However, the cost to
31 the purchaser of oil transported in barrels is from 3¼ to 3¾ cents per gallon above the cost when transported in tank cars. This higher cost is due to the additional weight upon which freight charges must be paid, depreciation in value of the barrels when used, greater waste than when transported in tank cars, and additional expense of handling and delivering. The freight charges alone, it was testified, are increased approximately 25 per cent by the added weight of the barrel. The price of lubricating oil is from 2½ to 22 cents per gallon f. o. b. cars at complainants' works; that of burning oil from 4½ to 5¾ cents per gallon, and of gasoline from 9½ to 17½ cents. It is evident that the addition of 3½ cents per gallon to the cost of oil when transported in barrels makes that method of transportation prohibitive and that the refusal of the railroads to furnish an adequate supply of tank cars would tend to drive out of business refiners who are unable to supply themselves with enough tank cars to move their products. Even witnesses who appeared in defendant's behalf admitted that tank cars are an absolute necessity for the transportation of refined products, and that their use effects an economic gain. Moreover, shippers are required to pay freight on the full shell capacity of tank cars, and the carload revenue derived from the movement of products in tank cars compares favorably with the revenue derived from movements in other cars. The transportation of oil in tank cars is desirable also from a purely transportation standpoint.

The bulk of the movement of refined oil is in tank cars owned by the shippers. In 1887 the Pennsylvania Railroad acquired 1,308 tank cars, some of which have subsequently been sold to independent refineries. Defendant now owns 499 tank cars, all that remain of those purchased in 1887 and 482 of which are furnished to shippers of oil located on its lines. The other railroads east of the Mississippi River own, in the aggregate, only 303 tank cars. The privately owned tank cars east of the Mississippi aggregate about 27,700, and the total number of tank cars owned in the United States was given as approximately 40,000.

At present the Pennsylvania Paraffine Company owns 54 tank cars and the Crew-Levick Company 57 tank cars. Complainants allege that these cars, together with the cars furnished by defendant, are not sufficient to meet the requirements of their business. It was testified that during the past five or six years complainants have made daily inquiry for the delivery of cars to their refineries and that a formal order for cars has constantly been on file in defendant's offices at Titusville and at Warren. On March 9, 1910, in a letter to defendant's superintendent at Buffalo, the Pennsylvania Paraffine Company demanded that in the future defendant furnish the neces-
sary tank cars for the transportation of complainants' product.
32 On March 30 the defendant's superintendent replied that complainants' request for tank cars actually needed for intended

shipments would receive due consideration, and would be complied with to such extent as the tank-car equipment of the company would permit. In fact, however, defendant did not comply with complainants' request further than to furnish cars in about the same proportion as before. Subsequent to making this request the Pennsylvania Paraffine Company purchased five and the Crew-Levick Company two additional tank cars, the former as late as September, 1913. On November 11, 1912, shortly prior to bringing this complaint, each complainant served defendant with a formal notice requesting it to furnish a sufficient number of tank cars to ship, respectively, 450,000 gallons of oil per month from the Pennsylvania Paraffine Company's refinery at Titusville and 600,000 gallons per month from the Glade Oil Works at Warren. To this request defendant's answer, through its general manager, was as follows:

"We beg to say that the railroad company is not prepared to increase its present tank-car equipment, but is prepared to transport the commodity, when properly contained in barrels or other similar containers, at rates that are fair and reasonable and nondiscriminatory."

Thereafter complainants brought this action.

Complainants' customers are in the main located in official classification territory. Complainants assert that defendant's line is the most direct route to nearly all of the destinations to which they are accustomed to ship, and that with fair service on defendant's part substantially all of the products of complainants' refineries would be transported over its line.

Complainants have of late been making a large part of their shipments over the Dunkirk, Allegheny Valley & Pittsburgh Railroad and the New York Central Lines, although these carriers have no tank cars of their own and their lines form, in many instances, a much more circuitous route than the lines of the Pennsylvania Railroad. Complainants give as their reason for preferring the indirect route of the New York Central Lines unfair settlement by the Pennsylvania of damages to complainants' private cars, frequent and unnecessary delay in delivering their shipments and returning empties, and the failure of defendant to report the location of complainants' cars. As regards the last point, the testimony shows that defendant is now giving the service desired, but as a result of the others complainants allege that they have suffered great pecuniary loss. It is stated that the service of the New York Central Lines is much better in these respects. Complainants allege that the private ownership of cars by shippers is bound to result in the unfair and unjust determination of damages to shippers' cars occasioned by rough usage, wrecks, and accidents which by the master car builders' rules should be
33 borne by the railroad, and in long and unnecessary delays in the return of empties.

Complainants state further that the cost of maintaining their privately owned tank cars far exceeds the rentals received from the railroads. They are also required in some States to pay taxes upon

the cars they own. These expenses would not fall upon the shipper if the railroads were required to furnish the necessary cars. Complainants state that the reason they originally provided themselves with tank cars of their own was that at that time the railroads could not be compelled to furnish this equipment, but that now, under the amended law, this duty has been specifically declared, and this commission has been given the power to enforce it.

While complainants' prayer is that defendant be required to furnish all the equipment needed for the transportation of their products, they allege that even if their own cars be taken into consideration the additional equipment has not been sufficient to meet the requirements of their business.

Defendant emphatically denies this to have been the case and contends that in the past three years it has furnished complainants with all the tank cars to which they were entitled. While exhibits introduced in evidence indicate that during the past few years defendant has supplied practically all the cars ordered by complainants, there have at times been long delays in filling the orders. The most extreme example of delay was in the case of an order of the Pennsylvania Paraffine Company for 15 tank cars on October 2, 1912, which was filled by the delivery of one car on each of the following dates: October 4, 5, 8, 14, 15, and 16, 1912; November 4, 5, and 12, 1912; December 10, 21, and 31, 1912; January 16, 1913; and March 10 and 11, 1913. A delay of over five months in filling an order for cars obviously shows that at least during that time defendant's equipment did not meet the reasonable demands of complainants. The evidence shows orders for cars to have frequently been given in excess of complainants' immediate needs, in expectation that defendant would fill them as rapidly as possible in the ordinary course of its business. Defendant also showed that tank cars furnished complainants have at times been refused, although it does not appear that such refusal was always made because complainants at the time had no further shipments to make. Although the testimony does not show that the tank cars furnished by defendant plus complainants' privately owned cars have at all times been insufficient to meet the requirements of complainants' business, it can nevertheless be safely stated that at times this has been the case.

It is plain that the cars furnished by defendant constitute but a small proportion of those required for the transportation of complainants' products. During the 12 months from November,
34 1912, to October, 1913, inclusive, the Pennsylvania Paraffine Company shipped in all 1,161 carloads of refined products, of which 821 were shipped over the New York Central lines and 340 over the Pennsylvania Railroad. Of the total 998 carloads an average of 83⅓ carloads per month was shipped in complainants' private cars, and 163 carloads, an average of 13 7/12 per month, in tank cars furnished by the Pennsylvania Railroad. During the same period the Glade Oil Works shipped 992 carloads, 535 over the New York Central lines and 457 over the Pennsylvania Railroad. Of

these, 844 carloads, or an average of 70⅓ per month, were shipped in tank cars belonging to the Crew-Levick Company, and 148 carloads, an average of 12⅓ per month, in Pennsylvania Railroad Company cars. It is obvious that if defendant is excused from its obligation to provide the equipment necessary to move complainants' products by reason of complainants having in the past provided cars of their own, complainants would always be compelled to supply whatever additional cars were from time to time needed to take care of increases in their business, even though complainants no longer desired to maintain cars of their own. Defendant has refused to increase its supply of tank cars. The question to be decided is not whether the cars supplied by defendant together with those owned by complainants are sufficient to meet complainants' demands, but rather whether complainants may retire from the business of furnishing tank cars for the transportation of oil and henceforth rely entirely upon the railroads to provide this equipment, or whether complainants must in the future continue to take care of the increasing demands of their business by buying additional tank cars.

Defendant argues that the act to regulate commerce neither imposes upon carriers the obligation to buy additional tank cars nor invests the commission with power to require the purchase of additional tank cars.

For the jurisdiction of the commission over the present controversy, complainants rely upon the following portions of the act to regulate commerce as amended in 1906 and 1910. Section 1 of the act provides that—

"* * * the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported; and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor, * * *."

Section 12 of the act provides:

"* * * the commission is hereby authorized and required to execute and enforce the provisions of this act * * *."

and section 15 provides:

35 "That whenever, after full hearing upon a complaint made as provided in section 13 of this act, or after full hearing under an order for investigation and hearing made by the commission on its own initiative (either in extension of any pending complaint or without any complaint whatever), the commission shall be of opinion that any individual or joint rates or charges whatsoever demanded, charged, or collected by any common carrier or carriers subject to the provisions of this act for the transportation of persons or property or for the transmission of messages by telegraph or telephone as defined in the first section of this act, or that any individual or joint classi-

fications, regulations, or practices whatsoever of such carrier or carriers subject to the provisions of this act are unjust or unreasonable or unjustly discriminatory, or unduly preferential or prejudicial or otherwise in violation of any of the provisions of this act, the commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable individual or joint rate or rates, charge or charges, to be thereafter observed in such case as the maximum to be charged, and what individual or joint classification, regulation, or practice is just, fair, and reasonable, to be thereafter followed, and to make an order that the carrier or carriers shall cease and desist from such violation to the extent to which the commission finds the same to exist, and shall not thereafter publish, demand, or collect any rate or charge for such transportation or transmission in excess of the maximum rate or charge so prescribed, and shall adopt the classification and shall conform to and observe the regulation or practice so prescribed."

The provisions of section 1 quoted above were inserted by the amendment of 1906; those of section 12 were added by the amendment of 1889; and section 15 was given its present form by the amendment of 1910, having previously been amended in 1906. Attention is called to these amendments because under the act, as originally passed, the commission did not have jurisdiction to require carriers to provide proper and adequate car equipment. Scofield v. L. S. & M. S. Ry. Co., 2 I. C. C., 67; Rice v. C., W. & B. Ry. Co., 3 I. C. C., 193; Re Transportation, etc., of Fruit, 10 I. C. C., 360.

The question of the commission's jurisdiction under the amended law was not brought before us until very recently. In Vulcan Coal & Mining Co. v. I. C. R. R. Co., 33 I. C. C., 52, we were asked to award damages due to a carrier's alleged failure to supply cars to certain coal mines upon reasonable request. The defendant in that case also denied the commission's jurisdiction. We held that the question presented was properly before us on the ground that the determination of damages necessitated the prior determination of the extent to which defendant failed to comply with the duty it owed complainants to furnish cars upon reasonable request therefor, which we held to be an administrative question of which this commission alone can take original jurisdiction.

Defendant's first argument is that it was not the intention of Congress in passing the act to regulate commerce and amendments thereto to forbid the operation of private car lines or the ownership of cars by shippers.

36 Defendant first calls attention to the fact that at the time of the consideration of this amendment, the private ownership of railroad cars, including tank cars used in the transportation of oil, had continued for many years and was well known to the public, to the commission, and to Congress. Moreover, in the hearings held during 1905 and 1906 with reference to the proposed amendments to the act, this subject was brought to the direct attention of the Senate Committee on Interstate Commerce by many witnesses. Many cases

of discrimination and rebates of that time occurred in connection with private car lines, and some shippers went so far as to demand that the act be so amended as to "forbid all carriers hauling cars carrying freight of any and every description that are not owned and controlled by such carriers themselves or by other carriers, bona fide such, and not created or existing for any other purpose."

After quoting several excerpts from the debates in Congress on the amendment of 1906, defendant argues that if Congress had intended to require the railroads to take over the privately owned cars or to confer upon the commission power to promulgate such a requirement it is inconceivable that the long debate on this amendment should disclose no intimation of this purpose. The following quotation from defendant's brief clearly shows the position taken:

"In view of the prevalence of the private ownership of cars, and in the light of the foreging evidence with reference to the proceedings before the Senate committee and in Congress, it is impossible to believe that the Hepburn amendment was intended to change the degree of the obligation of the carriers with respect to furnishing the equipment for the transportation of commodities which were partly or largely transported in privately owned cars of a special description. Certainly, if the Congress of the United States had intended any change of such profound magnitude (and had intended to endow the commission with a power which the commission had already decided it did not have, the provisions to this end would have been much more specific and definite than the provisions on which the complainants rely."

Defendant's argument is based upon the supposition that the interpretation which complainants seek to place upon the provisions of the act under discussion, by which the jurisdiction of the commission in the present case is sought to be upheld, would require the railroads to take over the privately owned cars or confer upon the commission power to promulgate such a requirement. This, however, would not necessarily be the case. Section 1 of the act provides that it shall be the duty of every carrier subject to the provisions of the act "to provide and furnish" transportation, including cars, upon reasonable request therefor. This does not require the carriers' ownership of cars, but places upon them the duty to provide cars, which may be cars of their own or cars which they have secured in some other manner. The carriers, subject to the act, are to obtain and
37 have ready for future use "all cars and other vehicles and all instrumentalities and facilities of shipment or carriage," and furnish the same upon reasonable request. The power of the commission to require the carriers to comply with their duty is subject only to the proviso that the request for "cars and other vehicles" and the "instrumentalities" and "facilities" of transportation shall be reasonable. Whether or not a particular request is reasonable is a matter for this commission to decide in each particular case.

Defendant calls attention to a provision of its charter whereby it is required to permit its rails to be used as a public highway for the

movement of privately owned cars. Boyle v. P. & R. Ry. Co., 54 Pa., 310; Hillsdale Coal & Coke Co. v. P. R. R. Co., 19 I. C. C., 356. In the light of what has been said above, it is evident that this provision of defendant's charter in no way conflicts with granting the relief prayed for.

It is further argued by the defendant that the requirement of section 1 to furnish transportation upon reasonable request was intended to transmute into an obligation under Federal law the common-law obligation of the carrier in this regard, and it is stated that there never was an obligation at the common law to supply a vehicle of a particular form or description when such form or description had no reference to the safety of transportation. Defendant states that so long as there is no unreasonableness or discrimination in the rates and so long as the carrier's equipment is adapted to the safe transportation of the goods intrusted to it, there is nothing in section 1 which in any way restricts the right of the carrier to choose and select the vehicle of transportation which it regards most satisfactory for the conduct of its business.

As bearing upon this point, it should first be stated that defendant holds itself out to transport oil in bulk. It not only publishes rates for the transportation of oil in tank cars but owns tank cars and supplies shippers with them. It leases cars owned by companies engaged in refining oil and transports their products in those cars at the rates it publishes for the movement by rail of oil in tank cars. It certainly can not be contended that the transportation by rail of oil in bulk could be attempted safely in any equipment other than tank cars.

Whatever the obligation of the carriers may have been under the common law, the requirements of the act are plainly more comprehensive than defendant contends. It is, of course, plain that the extent of defendant's obligation at common law is not determinative of its extent under the statute.

However, in further support of its argument that the requirements of section 1 to furnish transportation upon reasonable request
38 were merely intended to transmute into an obligation under Federal law the common-law obligation of the carrier, defendant calls attention to the safety appliance acts, which it is stated indicate that when Congress contemplates the imposition of obligations with respect to the equipment of carriers it covers the subject by careful specific rules. Defendant argues that if it had been the intention of Congress to endow the commission with the power to require the purchase of equipment of specialized character Congress would have defined the manner in which and the extent to which this power might be exercised. Attention is also called to the commission's recommendation, in its last report to Congress, that carriers be required to furnish steel coaches for passenger traffic, and it is argued that this is an admission of its lack of jurisdiction over matters concerning a carrier's equipment. If the commission can require carriers to furnish tank cars for the movement of oil, de-

fendant contends, it certainly must have jurisdiction to require them to furnish steel passenger coaches.

The attempted analogy does not exist. The power to require proper and adequate cars for the transportation of passengers, or of oil in bulk, is one thing. The power to require that such cars be of peculiar or especial design, pattern, or material is quite another thing. At common law shippers had a present remedy in the courts by suit for damages in case of a carrier's failure to perform its duty to transport safely. One of the conditions, however, which led to the passage of the act to regulate commerce and of the amendments thereto was the inability of shippers to find a present remedy in the case of rates charged for transportation of goods or regulations or practices affecting such transportation which were unjust, unreasonable, or discriminatory. And, as clearly appears from a reading of the provisions which were added by the amendment of 1906, to which reference has been made above, Congress at that time had in mind giving shippers a more adequate remedy in case the facilities for transportation were inadequate.

It is further contended by defendant that even if the act to regulate commerce declares the duty of carriers to provide special equipment it does not invest this commission with power to require the purchase of additional cars. It is stated that while the commission is charged with the enforcement of the act to regulate commerce its powers in cases coming up for decision after hearing on complaints, as provided in section 13, are fully defined in sections 15 and 16, which authorize the commission—

"* * * to determine and prescribe * * * the just and reasonable * * * rate or rates * * * to be thereafter observed * * * and what * * * regulation or practice is just, fair, and reasonable to be thereafter followed, and to make an order that the carrier or carriers shall * * * conform to and observe the regulation or practice so prescribed."

39 Defendant contends that the present case involves no rate, regulation, or practice, arguing that if it be a practice within the meaning of the act for the carrier to furnish only 500 tank cars, it could be contended with equal reason that every detail of railroad operation is a practice within the meaning of the act. Practice, it is contended, connotes a continued method of operation and not merely a single act.

While the act does not specify that this commission should regulate every detail of railroad operation, we are required by its terms to determine whether any rate or any regulation or practice affecting transportation is just, reasonable, and nondiscriminatory. Among other things we are required to decide whether or not in specific cases carriers have complied with the requirements of the act to furnish adequate facilities upon reasonable request. In Rail & River Coal Co. v. B. & O. R. R. Co., 14 I. C. C., 86, the commission said:

"* * * the words 'any regulations or practices whatsoever * * * affecting such rates' are used synonymously with the words

'regulation or practice in respect to such transportation;' and * * * both clauses are to be read in the widest possible sense and embrace all regulations and practices of carriers under which they offer their services to the shipping public and conduct their transportation * * *."

In Mobile Chamber of Commerce v. M. & O. R. R. Co., 23 I. C. C., 417, after calling attention to the provisions of section 1, including the requirement that carriers shall furnish cars upon reasonable request therefor, the commission said:

"* * * Under section 15 as amended in 1910 the commission is empowered to determine and prescribe what will be the just, fair, and reasonable regulation or practice which shall be thereafter followed by the carrier as to the services which the carrier is required to give under section 1."

In Arlington Heights Fruit Exchange v. S. P. Co., 20 I. C. C., 106, after calling attention to the relative advantages of precooling and standard refrigeration in the movement of citrus fruits from California to eastern markets, the commission said:

"Oranges can not be moved in box cars without ventilation. Let us assume that the ventilated car had been unknown and that the entire citrus-fruit crop had moved at all seasons of the year under refrigeration. It is discovered that by the use of a car so constructed that a current of air can be forced through the oranges by the motion of the car, two-thirds of the citrus-fruit crop can be transported without the expense of refrigeration. Could the defendants under these circumstances insist that all oranges should continue to move under refrigeration and would they rest under no obligation to provide ventilated cars?

"* * * This vast tonnage should be handled in the most economical and satisfactory manner, and these carriers should furnish for that movement such cars as will effectuate that purpose. They have a right to insist upon a proper compensation for supplying that equipment, but they have no right to say that old methods must continue in use and new methods held in abeyance rather than change the form of their cars.

40 "The carrier may insist upon furnishing all the equipment which is needed for the movement of precooled shipments and might decline to use equipment furnished by the shippers, but it can not refuse to furnish proper equipment upon fair terms; * * *."

The carriers who were defendants in this case petitioned the Commerce Court to annul and set aside the commission's order. The Commerce Court approved the findings of the commission and dismissed the complaint, whereupon the case was appealed to the United States Supreme Court, which held, Atchison Ry. Co. v. U. S., 232 U. S., 199:

"Whatever transportation service or facility the law requires the carrier to supply they have the right to furnish. They can therefore use their own cars, and can not be compelled to accept those tendered

by the shipper on condition that a lower freight rate be charged. So, too, they can furnish all the ice needed in refrigeration, for this is not only a duty and a right, under the Hepburn Act, but an economic necessity due to the fact that the carriers can not be expected to prepare to meet the demand, and then let the use of their plants depend upon haphazard calls, under which refrigeration can be demanded by all shippers at one time and by only a few at another."

And at page 217:

"Neither party has a right to insist upon a wasteful or expensive service for which the consumer must ultimately pay. The interest of the public is to be considered as well as that of shippers and carriers * * *."

In C., R. I. & P. Ry. Co. v. Hardwick Elevator Co., 226 U. S., 426, after referring to the provisions of section 1 of the act requiring carriers to furnish cars upon reasonable request, the United States Supreme Court said:

"Not only is there then a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty. * * *"

Attention should also be called to the following language used by the Commerce Court in United States v. L. & N. R. R. Co., 195 Fed., 88:

"This court has no jurisdiction to consider the question of car distribution in advance of some action by the Interstate Commerce Commission or to determine how many cars the Southern Railway shall furnish or how many the Louisville & Nashville Railroad shall furnish for the transportation of the petitioners' coal. It is believed, however, that this court has the undoubted jurisdiction upon the facts presented by the record to issue a writ or writs of mandamus directed to these common carriers, commanding them that, so long as they establish and maintain through routes and joint rates to southeastern territory, they shall move and transport in interstate commerce the coals of the petitioners when tendered in such reasonable quantities as may be determined either by agreement with the carriers or by the Interstate Commerce Commission if they can not agree."

The United States Supreme Court has repeatedly stated that the whole scope of the act to regulate commerce shows it to have been intended that this commission and not the courts shall pass upon administrative questions. T. & P. Ry. Co. v. Abilene Cotton
41 Oil Co., 204 U. S., 426; B. & O. R. R. Co. v. Pitcairn Coal Co., 215 U. S., 481; Robinson v. B. & O. R. R. Co., 222 U. S., 506; United States v. Pacific & Artic Co., 228 U. S., 87; P. R. R. Co. v. International Coal Mining Co., 230 U. S., 184; Mitchell Coal & Coke Co. v. P. R. R. Co., 230 U. S., 247; Morrisdale Coal Co. v. P. R. R. Co., 230 U. S., 304; S. Ry. Co. v. Reid, 222 U. S., 424; all of which

are quoted from at length in Vulcan Coal & Mining Co. v. I. C. R. R. Co., supra.

In T. & P. Ry. Co. v. Abilene Cotton Oil Co., 204 U. S., 426, 440, 441, it is stated that if, under the act to regulate commerce, the courts were given jurisdiction to determine the reasonableness of rates, the result would be as follows:

"* * * if, without previous action by the commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the commission and with the duty, which the statute casts upon that body, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed. Equally obvious is it that the existence of such a power in the courts, independent of prior action by the commission, would lead to favoritism, to the enforcement of one rate in one jurisdiction and a different one in another, would destroy the prohibitions against preferences and discrimination and afford, moreover, a ready means by which, through collusive proceedings, the wrongs which the statute was intended to remedy could be successfully inflicted."

Can it be doubted that if the courts were required to state what demands for cars are reasonable and when a carrier's equipment is adequate a similar lack of uniformity and like confusion would result?

In Vulcan Coal & Mining Co. v. I. C. R. R. Co., supra, we said:

"Furthermore, one can not escape the conclusion that the question as to the extent to which defendant failed to comply with the duty it owed complainants to furnish cars upon reasonable request therefor is an administrative one of which the commission alone can take original jurisdiction. This must be true unless it be the carrier's absolute duty to furnish cars at all times to the full extent of the shipper's demands. Only then would this complaint present a question like that considered in P. R. R. Co. v. International Coal Co., supra. It may be that after the determination by the commission of the number of cars which the defendant should have furnished and of the times when it should have furnished them the courts would have concurrent jurisdiction with the commission of the ascertainment of the damages suffered by complainants by reason of defendant's failure to perform that duty. However, it is not a carrier's duty to furnish all cars demanded at all times. In substance section 1 provides that upon reasonable request it shall be the duty of every carrier to furnish cars. By virtue of these requirements it becomes the carrier's duty to maintain a reasonably adequate car supply, and the question of what is a reasonably adequate car supply is just as much an administrative one as the question of what is a reasonable rate. The

legal sufficiency of defendant's car supply can not be definitely fixed by the statute. It is a question which, using the language of the court in the Mitchell case, 'involves a consideration and comparison of many and various facts and calls for the exercise of the discretion of' this tribunal."

42 One further argument advanced by defendant should be considered in connection with the question of jurisdiction. Defendant states that to require the carrier to purchase additional equipment may involve a demand that the carrier increase its capital account, and the power of the commission can only properly be determined by a consideration of its right to require such action on the part of the railroads. But such an objection is not sound, because the question of the financial ability of any carrier would be a matter for consideration in judging of the reasonableness of the request for special or additional equipment and would be one of the matters considered by the commission in judging the particular case when the same arises.

The jurisdictional question disposed of, we will now turn our attention to the defendant's contention that even if the act to regulate commerce should be held to invest this commission with power to require carriers to purchase additional cars, the evidence in this proceeding does not justify the commission in exercising this power.

It is contended that the circumstances attending the transportation of commodities in tank cars are so peculiar as to constitute this a class of equipment which should be furnished by the shippers themselves. Private ownership of tank cars prevails, particularly east of the Mississippi River. While it is recognized that the volume of shipments of petroleum is greater than the volume of shipments of any other liquid commodity, it is pointed out that there are numerous other liquid commodities transported in tank cars. Forty-four are enumerated in an exhibit. Some of the tank cars used for the transportation of these commodities are of very special construction. Albree v. B. & M. R. R., 22 I. C. C., 303. The same car can not be used for different liquid products without thorough cleaning, and as a consequence each car must be practically confined to the use of one commodity. While the shipper of a single commodity can familiarize himself and his employees with the risks peculiar to the handling of that particular commodity, the carrier would be under the necessity of acquainting its employees with all the possible difficulties and dangers of all liquid commodities transported. Even the tank cars now devoted to the petroleum trade must be divided into classes and their use restricted to the refined, light lubricating, and heavy lubricating classes. The demand for tank cars amounts in substance to a demand not only for the vehicle but also for the package, and relieves the shippers of the expense of packing which they may properly be called on to bear.

Finally, attention is called to the fact that the Pennsylvania Railroad owns more tank cars than are owned by all the other carriers operating east of the Mississippi. Defendant states that if

43 the other railroads would furnish cars in the same proportion the supply would be sufficient to meet all requirements, but that complainants' demand would practically require the Pennsylvania Railroad to furnish equipment available for use by all the railroads in this territory.

While it must be recognized that for the shipment of some of the products which now move to a certain extent in tank cars it would not be reasonable to require carriers to furnish tank cars, we do not believe this to be the case in the movement of the products of petroleum. In many industries a few tank cars will suffice to move the products of the industry. In other cases the tank cars must be prepared for shipment in a manner which is peculiarly within the technical knowledge of the men connected with that industry, or the handling of the commodity is a dangerous operation which can be safely performed only by men engaged in its production. In the latter case a shipper's request for cars peculiarly suited for the transportation of his products would not be a reasonable one, and in such cases carriers should publish rates for the transportation of the privately owned tank cars filled with these products and not, as in the case of oil, for the transportation of the product in tank cars. The railroad would not then hold itself out to transport the commodity in any other way than in tank cars offered by the shipper, and no obligation would rest upon it to furnish these cars. In such cases the shipper should receive no rental for the use of the car.

The record does not show such technical knowledge to be needed in the shipment of petroleum products in tank cars as to render unreasonable complainants' request to furnish cars. The fact that the defendant has for more than 20 years past been furnishing tank cars for the shipment of oil bears witness to the contrary. We see no particular hardship to defendant arising out of the necessity of allowing its equipment to move beyond its lines. Further, the necessity of defendant's purchasing a large number of additional tank cars does not follow from our holding in the present case. The requirement of the act is that defendant provide and furnish, not necessarily buy, a reasonably adequate supply of cars, and the 13,000 and more tank cars owned by independent car lines are available to defendant as well as to shippers. Defendant's brief contains the suggestion that perhaps the solution will be to have private companies furnish cars of special types. That is a solution of which the carriers can avail themselves if they so desire. Moreover, all cars used by carriers, whether they be owned by the carriers themselves or leased from private car lines or from shippers, must be distributed without discrimination. Hereafter the cars leased carriers by shippers or private car lines will be regarded as cars controlled by the carriers, which must be distributed without discrimination just as in
44 the case of cars owned by the carriers. This includes all cars secured from shippers for the use of which carriers pay compensation. Carriers should lease cars only upon such terms as permit

them to meet their obligation to furnish cars without discrimination. Under this ruling cars of complainants and of all other refiners upon defendant's line offered it for use at a compensation will become available to defendant for distribution among all shippers who may apply for them. At the same time, defendant will be under no obligation to accept for use any privately owned cars unless it chooses to do so. Atchison Ry. Co. v. U. S., supra.

The responsibility to the shipper of furnishing a proper supply of cars rests upon the road upon which the shipper is located and the traffic originates. Campbell's Creek Coal Co. v. A. A. R. R. Co., 33 I. C. C., 558, 562; Coal Rates on the Stony Fork Branch, 26 I. C. C., 168, 174. The originating line as between it and its connections does not necessarily rest under the burden of supplying all the cars which may be required for transportation over through routes and under joint rates, but in the case of through routes composed of two or more carriers the obligation to furnish cars for transportation over such through routes is joint upon the carrier therein. Huerfano Coal Co. v. C. & S. E. R. R., 28 I. C. C., 502, 506; Lumber Rates through Ohio River Crossings, 29 I. C. C., 38, 39; Pittsburgh & S. W. Coal Co. v. W. P. T. Ry. Co., 31 I. C. C., 660, 663.

One of the tests which may be relied upon in determining the reasonableness of a shipper's request for cars is to be found in the volume of his shipments in the past, due allowance being made for the growth of his business. Complainants have not only shown that the volume of their past shipments is such as to justify the demands for equipment which they have made but also have introduced evidence tending to show that in the future the volume of their business will be as great as in the past. Defendant will be required, upon reasonable request and reasonable notice, to furnish tank cars in sufficient number to move complainants' normal production. Defendant can not be required to furnish all the cars which may be demanded by complainants under extraordinary conditions arising from exceptional causes, which could not reasonably have been anticipated and which make it physically impossible to furnish all the cars desired.

An appropriate order will be entered.

CLARK, Commissioner, dissenting:

I am unable to agree with the conclusions reached by the majority. I do not think that the enactment of the provision of section 1 of the act, "and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor," enlarged the obligations or duties laid upon the carriers in this respect by the common law. It seems to me to have been the incorporation in the act of a declaration of the common-law duty of the carriers as a foundation for the exercise of the powers conferred upon the commission by the act. The terms "railroad" and "transportation" are defined in sec-

tion 1 in terms which are and were intended to be inclusive of all of the carrier's transportation facilities that are subject to regulation under the act. Section 15 enumerates various powers that are conferred upon the commission, and provides that that enumeration shall not exclude any power which the commission would otherwise have under the provisions of the act. Section 20 specifies certain liabilities which shall rest upon the carrier in the event of loss of or damage to property received by it for transportation, and provides that nothing in the section shall deprive the holder of the carrier's receipt or bill of lading of any remedy or right of action which he has under existing law. There is no language in section 1 which indicates a legislative intent to expand the common-law duty of carriers to furnish facilities for transportation.

The majority report in the instant case reasserts the possession by the commission of powers that were asserted in the majority report in Vulcan Coal & Mining Co. v, I. C. R. R. Co., 33 I. C. C., 52. If the act confers upon the commision power to order a carrier to enlarge its complement of cars and to award damages against it if it fails to comply with such order, it seems logically and necessarily to follow that the commission has the same power to order enlargement of terminal facilities, increase in the number of locomotives, and extension of tracks or branches. In fact, no facility of transportation is exempt. I think that this power is vested in the courts and not in the commission. For the reasons that were more fully stated in the dissent in the Vulcan Coal & Mining Co. case, supra, I am not able to accept the views of the majority on this point.

There can be no question of the right and power of the commission to so regulate the use of the facilities possessed by the carrier that there shall be no unjust discrimination. Plainly the shipper should not be required to deal with any other than the carrier in contracting for and receiving transportation, and such was plainly the intent of the Congress when all of the facilities were made subject to the act, regardless of ownership thereof. I, of course, agree that the carrier may provide facilities by purchase, lease, or rental, and that by whatever means they are acquired by the carrier the shipper has a right to demand the use thereof and service therefrom without unjust discrimination against or undue preference in favor of any.

Commisioner Clements requests me to say that he concurs in this dissent.

46 HARLAN, *Commissioner*, also dissenting:

I concur in the general thought underlying the dissenting report herein of my brother Clark, namely, that the language in the act upon which the majority report is largely based is simply declaratory of the general duty of carriers at common law to furnish such cars and other facilities as are reasonably necessary to enable them to fulfill their public obligations, but does not impose upon this com-

mission any such administrative duty or any such jurisdiction and power as are asserted in the majority report and in the order accompanying it.

47 ORDER.

At a general session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 11th day of May, A. D. 1915.

No. 5574.

PENNSYLVANIA PARAFFINE WORKS v. THE PENNSYLVANIA RAILROAD COMPANY.

No. 5574 (Sub-No. 1).

CREW-LEVICK COMPANY v. SAME.

These cases being at issue upon complaints and answers on file, and having been duly heard and submitted by the parties, and full investigation of the matters and things involved having been had, and the commission having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which said report is hereby referred to and made a part hereof:

It is ordered that the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist, on or before August 15, 1915, and thereafter to abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the act to regulate commerce and amendments thereto.

It is further ordered that said defendant be, and it is hereby, notified and required to provide, on or before August 15, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

And it is further ordered that this order shall continue in force for a period of not less than two years from the date when it shall take effect.

By the commission.

[SEAL.] GEORGE B. MCGINTY,
Secretary.

48 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY *vs.* UNITED STATES OF AMERICA. } No. 38, November Term, 1915.

Filed July 9th, 1915. J. Wood Clark, clerk.

SERVICE OF NOTICE.

And now, to wit, this 9th day of July, 1915, comes C. F. C. Arensberg, who, being duly sworn, deposes and says that on July 6, 1915, he sent by registered mail a true and correct copy of the petition filed by the plaintiff in the above proceeding to T. W. Gregory, Attorney General of the United States, at the Department of Justice, Washington, D. C., the registry return receipt showing the receipt thereof by the Attorney General being attached hereto.

CHARLES F. C. ARENSBERG.

Sworn to and subscribed before me the day and year aforesaid.

[SEAL.] EMMA M. HALLER,
Notary Public.

My commission expires March 9, 1919.

a Among the rolls, records and judicial proceedings had in the United States District Court for the Western District of Pennsylvania at No. 38, November term, 1915, may be found the following words and figures, to wit:

THE PENNSYLVANIA RAILROAD COMPANY *vs.* THE UNITED STATES OF AMERICA. } No. 38. November Term, 1915.

Appearances: Henry Wolfe Bikle, Patterson, Crawford & Miller; Joseph W. Folk and Edward W. Hines for Interstate Commerce Commission; Blackburn Esterline & E. Lowry Humes for U. S. A.

DOCKET ENTRIES.

July 3, 1915, petition filed.

July 9, 1915, proof of service of petition upon T. W. Gregory, Attorney General of the United States, filed.

July 13, 1915, proof of service of petition upon George B. McGinty, secretary of the Interstate Commerce Commission, filed.

Aug. 2, 1915, motion of United States to dismiss petition of Penna. R. R. Co. and acceptance of service of motion by attorneys for complainant filed.

Sept. 16, 1915, præcipe for appearance of Joseph W. Folk and Edward W. Hines for Interstate Commerce Commission filed.

Sept. 16, 1915, motion to dismiss argued C. A. V.

Nov. 9, 1915, majority opinion, Judges Woolley and Orr, concurring, suspending and annulling the order of the Interstate Commerce Commission, in accordance with the prayer of the petition, filed and entered.

Nov. 9, 1915, minority opinion, Judge Thomson dissenting and holding that the plaintiff's petition should be dismissed, filed and entered.

Nov. 13, 1915, interlocutory decree enjoining order of Interstate Commerce Commission filed and entered and exception and objection by defendants noted.

Dec. 7, 1915, petition for appeal filed.

Dec. 7, 1915, order allowing appeal filed and entered.

Dec. 7, 1915, assignments of error filed.

Dec. 7, 1915, citation awarded, issued, and service accepted by Henry Wolf Bikle and Thos. Patterson, solicitors for the Pennsylvania Railroad Company, appellee.

Dec. 7, 1915, præcipe for record filed.

Dec. 14, 1915, notice to attorney general of State of Pennsylvania of appeal filed.

49 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY *vs.* UNITED STATES OF AMERICA. } No. 38. November Term, 1915.

Filed July 13th, 1915. J. Wood Clark, clerk.

SERVICE OF NOTICE.

And now, to wit, this 13th day of July, A. D. 1915, comes C. F. C. Arensberg, who, being duly sworn, deposes and says that on July 6, 1915, he sent by registered mail a true and correct copy of the petition filed by the plaintiff in the above proceeding to George B. McGinty, secretary of the Interstate Commerce Commission, at Washington, D. C., the registry return receipt showing the receipt thereof by the secretary being attached hereto.

C. F. C. ARENSBERG.

Sworn to and subscribed before me the day and year aforesaid.

[SEAL.] EMMA M. HALLER,
Notary Public.

My commission expires March 9, 1919.

50 In the District Court of the United States for the Western District of Pennsylvania.

November Term, 1915.

THE PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT, *v.* UNITED STATES OF AMERICA, DEFENDANT. } In Equity, No. 38.

Filed Aug. 2d, 1915, J. Wood Clark, clerk.

MOTION OF THE UNITED STATES TO DISMISS THE PETITION.

Comes now the United States, defendant, by its counsel, and moves the court to dismiss the petition in the above-entitled cause at the cost of the petitioner.

As grounds for this motion it is shown—

1. The petition including the exhibits attached thereto and made a part thereof is without equity on its face and does not state any cause of action against the defendant, and the court may not grant the relief prayed or any part of the same.

2. It appears from the petition and the exhibits attached thereto and made a part thereof that the order of the Interstate Commerce Commission sought to be enjoined, set aside, annulled, or suspended was authorized by the act to regulate commerce, and that it was regularly made and entered by the commision in a proceeding properly pending and conducted.

51 3. The report of the Interstate Commerce Commission and the order entered in pursuance thereof were made and entered after a full hearing and due notice and rest on substantial evidence adduced on the issues made by the parties and the matters and things alleged in the petition and sought to be put in issue are foreclosed by the findings of fact.

4. The complainant has not in and by its said petition shown that in making its said orders the Interstate Commerce Commission transcended the powers conferred upon it by the statute or violated any right of the petitioner protected by the Constitution of the United States or any other right of the petitioner over which this court may exercise jurisdiction.

Wherefore, and for divers other good causes appearing on the face of the said petition more fully to be pointed out on the hearing hereof, this defendant prays that its motion be sustained, and for such other and further action as may be appropriate in the premises.

E. LOWRY HUMES,
United States Attorney, Western District of Pennsylvania.

BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.

We hereby accept service of notice of the filing of motion of the United States to dismiss the petition in the above-entitled case, of which the foregoing is a copy.

_____ _____,
Attorneys for Complainant.

PITTSBURGH, PA., *August 2, 1915.*

52 Service accepted of the within motion this 3rd August, 1915.

PATTERSON, CRAWFORD & MILLER,
Solicitors P. R. R.

53 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT,
v.
THE UNITED STATES OF AMERICA, DEFENDANT. } In Equity, No. 38.

Filed Sept. 16, 1915. J. Wood Clark, clerk.

APPEARANCE OF THE INTERSTATE COMMERCE COMMISSION.

We hereby enter the appearance of the Interstate Commerce Commission and of ourselves as counsel in the above-entitled cause.

JOSEPH W. FOLK,
EDWARD W. HINES,
Counsel for the Interstate Commerce Commission.

54 In the District Court of the United States for the Western District of Pennsylvania.

PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT,
vs.
UNITED STATES OF AMERICA AND CREW-LEVICK COMPANY, a corporation of the Commonwealth of Pennsylvania, defendants. } No. 38, Nov. term, 1915.

PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT,
vs.
UNITED STATES OF AMERICA AND PENNSYLVANIA PARAFFINE WORKS, a corporation of the Commonwealth of Pennsylvania, defendants. } No. 39, Nov. term, 1915.

Filed Nov. 9th, 1915. J. Wood Clark, clerk.

Petition for an interlocutory order or preliminary injunction restraining and suspending, until the final determination of this

cause, an order of the Interstate Commerce Commission, requiring the Pennsylvania Railroad Company to cease and desist from pursuing certain practices found to be in violation of the provisions of the act to regulate commerce. Motion to dismiss the petition.

Before Woolley, Circuit Judge, and Orr and Thomson, District Judges.

The refined-oil product of this country is carried and transported in tank cars, by pipe lines, and by rail in barrels or similar containers. The cost of carrying oil in barrels is three and one-half cents a gallon above the cost of carrying it in tank cars, due to freight charges on the weight of the barrels and to the added cost of handling, maintenance, and replacement, making shipment by this method expensive, if not prohibitive.

Ninety-one per cent of the refined-oil product is carried in tank cars, the remainder being carried by pipe lines and by rail in barrels. The oil carried in tank cars is consigned and shipped almost exclusively in privately owned tank cars; that is, tank cars owned by or leased to the shipper, for the use of which the carrier pays
55 wheelage. The number of tank cars in the United States is 40,000. The number of privately owned tank cars east of the Mississippi River is 27,700. The Pennsylvania Railroad Company owns 499. Other carriers east of the Mississippi River own in the aggregate 303. Some carriers own none.

Fifty-two kinds of articles used for food and in the arts are shipped in tank cars. Differences in the nature and uses of the articles make impossible the interchange of tank cars for their shipment.

The Pennsylvania Railroad Company publishes rates for the transportation of oil in tank cars and furnishes tank cars within the limit of its supply.

The oil refineries of the Pennsylvania Paraffine Works and Crew-Levick Company are situate in the State of Pennsylvania and are served by the Pennsylvania Railroad Company and the New York Central Railroad Company. The Pennsylvania Paraffine Works ships monthly about 750,000 gallons of refined oil, of which ninety-one per cent moves in tank cars, one and one-half per cent in barrels, and the remainder in pipe lines.

Crew-Levick Company ships monthly about 500,000 gallons of refined oil, of which eighty-six per cent moves in tank cars and about five per cent in barrels, and the remainder in pipe lines. The former company owns 54 tank cars and the latter company fifty-seven.

It developed in the testimony that the tank cars furnished by the railroad company, in addition to the complainants' privately owned tank cars, were not at all times sufficient to meet the requirements of the complainants' business. During a specimen period it appears that of the monthly shipments of the product of the former company eighty-three carloads were carried in its privately owned tank

cars and thirteen carloads in tank cars furnished by the railroad company; and of the monthly shipments of the product of the latter company, 70 carloads were carried in its privately owned tank cars and 12 carloads in tank cars provided by the railroad company.

The tank cars owned by the two companies, together with their pro rata share in the distribution of the tank cars of the railroad company, being inadequate for their requirements, and conceiving it to be the duty of the railroad company to furnish tank cars of the type and in the number required, the two companies demanded of the Pennsylvania Railroad Company a sufficient number of tank cars in which to ship their monthly product. To this demand
56 the railroad company replied, "We beg to say that the railroad company is not prepared to increase its present tank-car equipment but is prepared to transport the commodity, when properly contained in barrels or other similar containers, at rates that are fair, reasonable, and nondiscriminatory." Whereupon complaints were lodged with the Interstate Commerce Commission, a hearing held, and the following order made:

"It is ordered that the Pennsylvania Railroad Company be, and it is hereby, notified and required to cease and desist on or before August 15, 1915, and thereafter to abstain, from refusing upon reasonable request and reasonable notice therefor to provide and furnish tank cars to the complainants herein for interstate shipments of petroleum products, which refusal has been found in said report to be in violation of the provisions of the act to regulate commerce and amendments thereto.

"It is further ordered that said defendant be, and it is hereby, notified and required to provide, on or before August 15, 1915, and thereafter to furnish, upon reasonable request and reasonable notice, at complainants' respective refineries, tank cars in sufficient number to transport said complainants' normal shipments in interstate commerce.

"And it is further ordered that this order shall continue in force for a period of not less than two years from the date when it shall take effect."

After securing an extension of the order the railroad company filed its petition in this court, praying that a preliminary injunction be entered restraining and suspending the order of the Interstate Commerce Commission. The Government moved to dismiss the petition. The motion and the petition were heard together.

Woolley, circuit judge (after stating the facts as above):

The proceeding now before the court was instituted and conducted under section 13 of the act to regulate commerce, giving to any person complaining of anything done or omitted to be done by a common carrier in contravention of the provisions of the act, the right to apply to the Interstate Commerce Commission for redress; and after a finding adverse to the carrier the order entered was made under section 15 of the act, which provides in effect that whenever, after hearing, the commission shall be of opinion that a prac-

57 tice of a carrier is unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial or otherwise in violation of any of the provisions of the act, the commission is authorized and empowered to determine and prescribe what practice is just, fair, and reasonable, and to order the carrier to cease and desist from the unlawful practice, and thereafter to conform to and observe the regulation or practice prescribed, under penalty of five thousand dollars for each offense.

The practice of the railroad company, found by the commission in this instance to be violative of the statute, is not that the railroad company discriminated against the shipper by an unequal distribution of tank cars. It is conceded that the commission may require a carrier to desist from a discriminatory practice in car distribution. This is one of the admitted powers of the commission to be exerted over a carrier in the use of the instrumentalities which it possesses.

What the commission found was that the railroad company was guilty of an unjust and an unreasonable practice in not possessing or in not acquiring and furnishing tank cars in sufficient number to meet the requirements of the complainants' business.

The question in this case, in the abstract, is whether the act to regulate commerce, as amended, imposes upon a carrier the duty to acquire and to provide and furnish transportation of a type that, physically or economically, is best adapted to the needs and uses of the shipper, of which the Interstate Commerce Commission is the judge. The precise question is whether the Interstate Commerce Commission has power to compel the Pennsylvania Railroad Company to purchase and acquire tank cars for the shipment of oil, and to provide the same to complaining shippers upon requests which the commission may adjudge reasonable.

For the validity of its order the Interstate Commerce Commission relies upon several provisions of the act to regulate commerce as amended and upon certain changes and differences in the act created by its amendments. The first section of the act, both in its original and amended state, contains definitions of different branches of the subject with which the act deals. The terms "common carrier." "railroad" and "transportation," are, by express language, given their statutory meaning. Section 1 of the act of 1887 provides that

"the term 'transportation' shall include all instrumentalities
58 of shipment or carriage." As amended by the act of 1906, the term "transportation" is enlarged and is made to "include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Having stated of what transportation consists, the section prescribes it to "be the duty of every carrier * * * to provide and furnish such transportation upon reasonable request therefor."

Excerpts from several opinions of the Supreme Court were cited in support of the Government's contention that a railroad company, holding itself out as a carrier, is under a legal obligation arising out of the fact of its employment to provide transportation means and facilities commensurate with the demands of shippers, without regard to whether they possess them or have the money with which to acquire them. These excerpts were, of course, not cited as decisive of the question in issue, because upon examination it is disclosed that the cases from which they were taken were decisive of matters altogether different. These expressions of the Supreme Court, standing alone and considered without reference to the facts of the cases in which they appear, seem to support the Government's contention, but an examination of the cases discloses that the suitable and necessary means and facilities which the Supreme Court has said the carrier must provide, have especial reference and relation to the facts of those cases, which in nearly every instance present questions of discrimination or of "services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling or property transported," as specifically provided by the statute. In none of them was the question raised or decided nor in any did the Supreme Court reveal its opinion as to whether there devolved upon a carrier a statutory duty to provide and furnish transportation of a type it did not possess, or to acquire such transportation in order to provide and furnish the same upon reasonable request. Railroad Co. vs. Pratt, 22 Wall., 123, 128; Covington Stock Yards Co. vs. Keith, 139 U. S. 128, 133; Arlington Heights Fruit Exchange vs. Southern Pacific Co., 20 I. C. C., 106, affirmed by the Supreme Court in Acheson Ry. Co. vs. United
59 States, 232 U. S., 199; Chicago, Rock Island and Pacific Ry. Co. vs. Hardwick Farmers' Elevator Co., 226 U. S., 426; Missouri, Kansas and Texas Ry. Co. vs. Harris, 234 U. S., 412, 418; Yazoo and Mississippi Valley R. R. Co. vs. Greenwood Grocery Co., 227 U. S., 1; St. Louis, Iron Mountain and Southern Ry. Co. vs. Edwards, 227 U. S., 265; Hampton vs. St. Louis, Iron Mountain and Southern Ry. Co., 227 U. S., 456; Penn Refining Co. vs. Western New York and Pennsylvania R. R. Co., 208 U. S., 208; Texas and Pacific Ry. Co. vs. Abilene Cotton Oil Company, 204 U. S., 426; Baltimore and Ohio R. R. Co. vs. United States, Ex. Rel. Pitcairn Coal Co., 215 U .S., 481.

There is thus presented for decision, with little, if any, aid from previous delivereance by the courts, the original question which divided the Interstate Commerce Commission in this case and in the case of Vulcan Coal and Mining Company vs. I. C. R. R. Co., 33 I. C. C., 52, whether the duty imposed upon a carrier to provide and furnish cars to the shipper is the duty imposed by the common law or is a different and a broader duty prescribed by the statute, and whether the power of the Interstate Commerce Commission to prevent undue preference and unjust discrimination in the use of a carrier's cars has been enlarged and expanded into a power to con-

trol the "practices" of carriers by determining and prescribing the type and character of "all (their) instrumentalities and facilities of shipment or carriage" in order to procure for the shipper a better, safer, and more economic transportation service.

In seeking the authority of the commission to make the order in controversy we have nothing to do with the merit of the order, the injustice of the practice found to exist, or the wisdom of the practice established (Texas and Pacific Ry. Co. vs. I. C. C., 162 U. S., 197, 219; I. C. C. vs. Alabama Midland Ry. Co., 168 U. S., 144, 170), nor have we anything to do with the effect of the order upon private car lines. We are concerned only with the law under which the order was made and the commission acted, assuming its findings of fact to be conclusively correct. I. C. C. vs. Illinois Central Ry. Co., 250 U. S., 452; Baltimore and Ohio Railroad Co. vs. United States, Ex Rel. Pitcairn Coal Co., 215 U. S., 481; Pennsylvania Company vs. United States, 236 U. S., 351, 361.

The question of the duty of the carrier and the correlative question of the commission's power to enforce the performance of that duty, as they are presented in this case, had their rise in a
60 change in the definition of the term "transportation" made by the amendment of 1906. Section 1 of the original act prescribed that "the term 'transportation' shall include all instrumentalities of shipment or carriage." Instrumentalities of shipment, of course, include cars, and cars have been treated as such from the date of the act to the date of its amendment in 1906. But in Scofield vs. Lake Shore and Michigan Southern Railway Co., 4 I. C. C., 158; 2 I. C. R., 67, 76, the Interstate Commerce Commission considered that the sole duty of a carrier to furnish cars was that imposed by the common law and that the statute creating the commission did not clothe it with power to determine the instrumentalities of shipment to be employed by a carrier or to require a carrier to use in its business the kind and number of cars which the commission may deem necessary for a proper car service. In discussing this case the commission said that "the power, if it should be held to exist at all, on the part of the Interstate Commerce Commission to require a carrier to furnish tank cars when that carrier is furnishing none whatever in its business would apply equally to sleeping cars, parlor cars, fruit cars, refrigerator cars, and all manner of cars as occasion might require and would be limited only to the necessities of interstate commerce and the discretion of the Interstate Commerce Commission. A power so extraordinary and so vital, reached by construction, could not justly rest upon any less foundation than that of direct expression or necessary implication, and we find neither of these in the statute."

It is contended, however, that by the amendatory act of 1906, changing the definition of the term "transportation," there is such direct statutory expression conferring such extraordinary power, and that the measure of duty theretofore resting upon the carrier to furnish cars was changed from a common-law duty, with resort to the

courts for its violation, to a statutory duty, with redress for its violation by the Interstate Commerce Commission. The act of 1906 as before quoted prescribes that "the term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage" and certain defined services to be rendered in connection therewith. The services defined are the principal additions to the definition and relate to the receipt, delivery, transfer, ventilation, refrigeration, storage, and handling of property transported. With these we have nothing to do in this
61 case, except to note that they constitute the principal, if not the entire, additions to the old definition and are subject matters of the commission's control not embraced in the original act. While the word "cars" was not used in the definition of transportation as contained in the original act, it has never been doubted that in the words "instrumentalities of shipment" and within the term "transportation" cars were included.

The definition of the term "transportation" as it appears in the amendment of 1906, so far as it relates to cars, does nothing more than express what was implied in the original definition, and contains nothing which suggests that in furnishing transportation there shall rest upon the carrier a duty to furnish cars of a kind different from those required of the carrier under the original act.

We find no case prior to the amendatory act of 1906 which questioned that cars were "instrumentalities of shipment or carriage." If such a question existed, then the act of 1906, naming cars as one of the instrumentalities of shipment, might have been a change with a purpose, creating a difference in legal effect.

In seeking the effect of the amendment of 1906, inquiry may be made with respect to the purpose of Congress in enacting it. It is apparent from the addition to the definition of "transportation" contained in the amendment that Congress intended and clearly succeeded in including within that term certain services which theretofore had not been embraced within it and over which Congress deemed it advisable that the Interstate Commerce Commission should have power and control. These were ventilation, refrigeration, icing, storage, and handling of property transported. This power was conferred upon the commission for the avowed purpose, among others, of relieving the shipper of the task and annoyance of dealing with more than one person. These were new matters and therefore were additions to what was meant by transportation as defined in the original act. But the addition of the word "cars" in the amendment made no addition to the definition in the original act, because cars were already embraced within it.

We find nothing in the original or amended act which, by express language, imposes upon a carrier the extraordinary duty or
62 confers upon the Interstate Commerce Commission the extraordinary power claimed by the Government in this proceeding. If they exist, they can be found only by implication, and it is doubtful if Congress would leave to implication an intention

to impose so onerous a duty and to grant so great a power. On the other hand, we find in the act, by clear expression, duties imposed upon carriers which are not absolute in their nature, but are qualified by the ability of the carriers to conform to the duties prescribed.

The provision of the act requiring a carrier to maintain and operate switch connections with lateral or branch-line railroads, appearing in the last paragraph of the first section of the act, imposes upon a carrier the duty to "furnish cars for the movement of such traffic to the best of its ability without discrimination in favor of or against any such shipper." The words "to the best of its ability," of course, qualify the duty to maintain switch connections, and do not qualify the prohibited discrimination.

Again, in section 3 of the act, it is provided that "every common carrier * * * shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for receiving, forwarding, and delivering of passengers and property." Here, again, the carriers' duty to provide and furnish facilities of transportation is not absolute. The duty is laid upon them "according to their respective powers." Such expressions rather raise the implication that Congress did not intend to place an absolute and unqualified duty upon carriers to furnish cars of a certain type whether they had them or not, and if they did not have them, then to acquire them, whether they had the money or not. Restricting our construction of the act to its words, and finding nothing by implication that changes or qualifies their meaning, we are of opinion that the amendment of 1906, including cars within the definition of "transportation," added nothing to the original duty of the carrier as prescribed by the original act and as interpreted by the commission, and vested in the commission no increase of power over cars as instrumentalities of shipment. If, under the act as amended, no different or greater duty is imposed upon a carrier with respect to furnish-
63 ing and providing cars than was prescribed by the original act, then the practice of the carrier found unlawful in this case was not in violation of the statute, and the order of the commission directing the carrier to desist from that practice was an exercise of power not conferred by law.

The act to regulate commerce does not confer upon the Interstate Commerce Commission all power over cars and other instrumentalities of shipment. Congress has reserved unto itself, and from time to time has exercised, power to control and regulate certain instrumentalities of shipment, notably by the acts establishing the standard height of draw bars, prescribing safety appliances, and regulating the hours of service of the carriers' employees. But aside from special enactments of this class, Federal legislation regulating commerce, in so far at least as it is contained in the act of 1887 and its amendments, has thus far left carriers free to exercise their own judgment in the purchase, construction, and equipment of their roads and in the selection of their rolling stock. By this legislation

Federal control has been assumed over the use to which the carriers' roads and equipment are put, to the end that the flow of commerce, in the employment of those instrumentalities, may not be impeded, and that unjust rates shall not be charged and unfair practices pursued to the injury of persons and localities. The law clearly confers upon the commission power to so regulate the use of the facilities possessed by the carrier that there shall be no unjust discrimination, but we find nothing in the law which confers upon the commission power to compel a carrier to acquire facilities it does not possess or to acquire better facilities than those it possesses, not with the object of preventing discrimination and preferences, but in order that the shipper may have larger, better, and perhaps more economical facilities. We are of opinion that in making the order the Interstate Commerce Commission exceeded its statutory power, and that the order should be suspended and annulled in accordance with the prayer of the petition.

Thomson, District Judge, dissents.

64 In the District Court of the United States for the Western District of Pennsylvania.

PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT, VS. UNITED STATES OF AMERICA AND CREW-LEVICK COMPANY, A CORPORATION OF THE COMMONWEALTH OF PENNSYLVANIA, DEFENDANTS.

PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT, VS. UNITED STATES OF AMERICA AND PENNSYLVANIA PARAFFINE WORKS, A CORPORATION OF THE COMMONWEALTH OF PENNSYLVANIA, DEFENDANTS.

Filed Nov. 9th, 1915. J. Wood Clark, clerk.

Thomson, J. (dissenting).

Finding myself unable to concur in the conclusion reached by the majority of the court, I have thought proper, in view of the importance of the case, to briefly assign the reasons which control my judgment.

We have nothing to do with the wisdom of the order. The findings of the commission are presumed to be true and to have justified its action, if only the power to exercise it exists. On this question of power alone the commission was divided. If there rested no legal duty on the carrier to provide the transportation called for, it follows that the commission was without power to make the order in question. The conclusion of the court adverse to the action of the commission is concisely set forth in the concluding portion of the majority opinion thus:

"The law clearly confers upon the commission power to so regulate the use of the facilities possessed by the carrier that there shall be no unjust discrimination, but we find nothing in the law which confers upon the commission power to compel a carrier to acquire facilities it does not possess or to acquire better facilities than those

it possesses, not with the object of preventing discrimination and preferences, but in order that the shipper may have larger, better, and perhaps more economical facilities."

This is the issue, and the solution of the question must be found mainly in the proper interpretation of the term "transportation" as used in the amendment of 1906.

65

In the original act of February 4, 1887, it is said: "The term 'transportation' shall include all instrumentalities of shipment or carriage." These words are clearly comprehensive enough to include cars as an instrument of shipment. But we need not stop to conjecture as to their full breadth and meaning. It is sufficient that Congress thought proper to enlarge the scope of the term "transportation" by providing in the act of 1906 as follows: "The term 'transportation' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage, irresponsive of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported, and it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation upon reasonable request therefor and to establish through routes and just and reasonable rates applicable thereto." This, instead of being a concise and accurate definition of the term "transportation," is rather a legislative declaration of what the term shall include. Much broader than the words "all instrumentalities of shipment and carriage" in the original act are the words of the amendment, "cars and other vehicles and all instrumentalities and facilities of shipment or carriage." The very comprehensive word "facilities" of shipment and carriage was a significant addition to the original act. These words are again made more comprehensive by the words which follow, "irrespective of ownership or of any contract, express or implied, for the use thereof." Whether held by the carrier by purchase, hire, exchange, lease, bailment, or any contract for their use, express or implied, they are to be regarded as the instruments of the carrier, and the shipper, as well as the commission, is thus relieved of the annoyance of dealing with more than one person. The scope of the term transportation is again enlarged by the use of the words "and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported." Having thus defined transportation, it is then declared to be the duty of every carrier subject to the provisions of the act to provide and furnish such transportation upon reasonable request therefor.

66

Whatever may have been the duty resting on a carrier at common law to furnish transportation of the shipper's property, it admits of no doubt that the furnishing of transportation, as defined by the act, has been made a clear statutory duty of the carrier. As

was said by Chief Justice White in Chicago, R. I. & Pac. R. R. Co. v. Hardwick Elevator Co., 226 U. S., 426:

"The purpose of Congress to specifically impose a duty upon a carrier in respect to the furnishing of cars for interstate traffic is, of course, by these provisions clearly declared. * * * Not only is there, then, a specific duty imposed to furnish cars for interstate traffic upon reasonable request therefor, but other applicable sections of the act to regulate commerce give remedies for the violation of that duty."

It is plainly the duty of the carrier not only to furnish cars on reasonable request but to furnish cars reasonably suitable for the proper transportation of the freight to be shipped. This general proposition is stated by Hutchinson on Carriers, sec. 536, as follows:

"If the goods are of such a nature as to require for their protection some other kind of car than that required for ordinary goods and cars adapted to the necessity are known and in customary use by carriers, it is the duty of the carrier, where he accepts the goods, to provide such cars for their carriage."

In Covington Stock Yards Co. v. Keith, 139 U. S., 128, Justice Harlan, speaking for the Supreme Court, said:

"The railroad company, holding itself out as a carrier of live stock, was under a legal obligation, arising out of the nature of its employment, to provide suitable and necessary means and facilities for receiving live stock offered to it for shipment over its road and connections as well as for discharging such stock after it reaches the place to which it is consigned. The vital question in respect to such matters is whether the means and facilities so furnished by the carrier or by some one in its behalf are sufficient for the reasonable accommodation of the public."

In the same opinion the court says:

"The carrier must at all times be in proper condition both to receive from the shipper and to deliver to the consignee, according to the nature of the property to be transported as well as to the necessities of the respective localities in which it is received and delivered."

This case, assuming that proper facilities for the transportation of the stock must be furnished, goes further and extends the duty of the carrier to providing suitable means for its receipt and discharge.

If, then, it is the duty of the carrier on reasonable request to furnish coal cars to the shipper of coal, stock cars to the shipper of live stock, fruit cars, with refrigeration, for the shipper of fruit, on no principle could the oil shipper be denied cars reasonably suited for the shipment of oil.

67 The word "reasonable," as used in the act, is a qualifying and saving term. Not merely the demands and needs of the shipper are to be considered, but the circumstances of the carrier, and the rights of the public as well. The fitness and efficiency of the transportation requested; whether the facilities of shipment would be made better and more economical; the public advantage to

be derived therefrom; the cost and expense in relation to the benefit resulting; all the circumstances, time and place, and means as affecting the carrier and its ability to supply the transportation demanded—these and all other relevant matters may be considered in determining the reasonableness of the shipper's demand. If the request be reasonable, it is the legal duty of the carrier to comply with it; if unreasonable, no such duty devolves upon the carrier. And this question of fact, in case of dispute, the commission must decide. Almost all duties are relative rather than absolute, and the exercise of a clearly vested power largely depends upon the facts which call for its exercise. Even the clearly expressed duty of the carrier to furnish cars on reasonable request is not absolute; Hampton v. St. L., Iron Mt. & S. Ry. Co., 227 U. S., 467. Thus the right of the shipper to demand transportation, on the one hand, is conditioned on the fact that his request be reasonable; and the duty, on the other, to comply is not absolute but dependent on the facts of the case. We are not passing on some abstract proposition as to the power of the commission to order, without restraint, the equipment and furnishing of cars without reference to conditions or circumstances. We are passing on a concrete question based on specific facts, conclusively found by the commission. It would be easy to imagine on the part of a shipper an unwarranted and unreasonable request, and on the part of the carrier an arbitrary and unjust denial of a reasonable demand. The Interstate Commerce Commission is the tribunal standing between the parties with power to hear and determine, and especially competent by reason of experience to determine, with justness and uniformity of decision.

I can not agree with the proposition that the duty imposed upon the carrier to furnish cars is limited to those which the carrier may have on hand, or that there is no obligation to acquire facilities
68 it does not possess, or to acquire better facilities to meet the reasonable demands of the shippers. I base my conclusion on words of the act itself, "it shall be the duty of every carrier subject to the provisions of this act to provide and furnish such transportation on reasonable request therefor." No words more specific or definite than "provide and furnish" could have been chosen. I find no limitation of any kind in the act upon the duty thus imposed upon the carrier, except only that the request therefor be reasonable. There are no words from which it can fairly be assumed that existing ownership or control is a prerequisite to the carrier's duty to provide and furnish. From the explicit words of the act it would seem to follow that if a reasonable request is made for cars and the carrier does not possess them, it must acquire them for use by one of the many methods for their acquisition. If not, this most important provision of the statute would be rendered largely nugatory. Perhaps the most effective blow which Congress could deal at discrimination in interstate traffic is the duty imposed on the carrier to furnish transportation. There could be no more prolific source of discriminating practices than the right in the carrier to grant or

withhold the means of transportation at its discretion. The demands of the favored shipper would be met by promptly acquiring and furnishing the transportation called for. We do not have what you demand, would be a conclusive answer to the less favored. The flow of commerce is more vital to the public than that commerce should flow unimpeded. That transportation be furnished is more vital than that it be free from discrimination and preference. If the primary object of the act is to prevent discrimination, Congress evidently realized that the most effective method of prevention is to remove the opportunity for discrimination. We must assume that if Congress had intended to set limitations on that duty it would have done so in apt words, as it did with reference to other provisions of the act. For instance, the duty of the carrier to construct and operate switch connections with any lateral branch line of railroad or private side track is conditioned that such connection is reasonably practicable, and can be put in with safety, and will furnish sufficient business to justify the connection and maintenance of the same, and shall furnish cars for the movement of such traffic to the best of its ability. Again, the carrier's duty to furnish
69 facilities for the interchange of traffic between their respective lines is qualified by the expression "according to their respective powers." It is highly significant, therefore, that the more important duty to furnish transportation has no limitation or condition, except upon the reasonable request of the shipper.

If the wisdom of the order in question, or its necessity, needed justification, it appears in the conclusive findings of the commission that 91% of the refined oil of the country is shipped in tank cars at a great economic gain. I would therefore dismiss the petition of the complainant company.

70 In the District Court of the United States for the Western District of Pennsylvania. November Term, 1915.

THE PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT, v. UNITED STATES OF AMERICA, DEFENDANT, AND Interstate Commerce Commission, intervening defendant.	In Equity, No. 38.

Filed Nov. 13th, 1915. J. Wood Clark, clerk.

INTERLOCUTORY DECREE ENJOINING ORDER OF INTERSTATE COMMERCE COMMISSION.

And now, to wit, this 13th day of November, 1915, at Pittsburgh, this cause came on for hearing before Circuit Judge Victor B. Woolley and District Judges Charles P. Orr and W. H. Seward Thomson on the application for an interlocutory injunction and the motions to dismiss, and the same were argued by counsel and sub-

mitted to the court. On consideration whereof, it was ordered, adjudged, and decreed as follows:

First. That the motion of the United States of America, defendant, to dismiss the petition be, and the same is hereby, overruled.

Second. That the motion of the Interstate Commerce Commission, intervening defendant, to dismiss the petition be, and the same is hereby, overruled.

Third. That the application of the complainant for an interlocutory injunction be, and the same is hereby, granted, as prayed in the petition, and that an interlocutory injunction be, and the same
71 is hereby, issued out of this court enjoining, annulling, and suspending the order of the Interstate Commerce Commission in the case of Pennsylvania Paraffine Works v. Pennsylvania Railroad Company, No. 5574 and The Crew-Levick Company v. Pennsylvania Railroad Company No. 5574 (Sub. No. 1), entered at a general session of the Interstate Commerce Commission at its office in Washington, D. C., on the 11th day of May, A. D. 1915, and that the said defendants, and each of them, their officers, members, examiners, agents, and attorneys, and any and all persons whomsoever be enjoined and restrained from enforcing, or in any manner attempting to enforce or carry out, the said order or the terms thereof until the further order of the court.

By the court:

CHARLES P. ORR,
United States District Judge,
Western District of Pennsylvania.

To which said order or decrees the defendants, and each of them, by their respective counsel, severally object and except.

CHARLES P. ORR,
Judge U. S. District Court,
Western District of Pennsylvania.

72 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, complainant, *v.* UNITED STATES OF AMERICA, DEFENDANT, AND Interstate Commerce Commission, intervening defendant.	In Equity, No. 38.

Filed Dec. 7, 1915. J. Wood Clark, clerk.

PETITION FOR APPEAL.

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, feeling themselves aggrieved

by the interlocutory order or decree of the District Court, entered November 13, 1915, pray an appeal to the Supreme Court of the United States from the said interlocutory order or decree.

The particulars wherein said defendant and the intervening defendant consider said interlocutory order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

And the said defendant and the intervening defendant pray that a transcript of the record, proceedings, and papers on which the said interlocutory order or decree was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

E. LOWRY HUMES,
United States Attorney, Western District of Pennsylvania.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
JOS. W. FOLK,
Solicitor for the Interstate Commerce Commission.

73 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, complainant,
v.
UNITED STATES OF AMERICA, DEFENDANT, AND Interstate Commerce Commission, intervening defendant.
} In Equity, No. 38.

Filed Dec. 7, 1915. J. Wood Clark, clerk.

ORDER ALLOWING APPEAL.

In the above-entitled cause United States of America, defendant, and Interstate Commerce Commission, intervening defendant, having made and filed their petition praying an appeal to the Supreme Court of the United States from the interlocutory order or decree of the District Court, entered November 13, 1915, and having also made and filed an assignment of errors, and having in all respects conformed to the statutes and rules of court in such case made and provided:

It is ordered and decreed that the said appeal be, and the same is hereby, allowed as prayed and made returnable within thirty (30) days from the date hereof; and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered to the Supreme Court of the United States.

CHAS. P. ORR,
United States District Judge,
Western District of Pennsylvania.

74 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, COMPLAINANT,
v.
UNITED STATES OF AMERICA, DEFENDANT, AND INTERSTATE COMMERCE COMMISSION, INTERVENING DEFENDANT.
} In Equity, No. 38.

Filed Dec. 7th, 1915, J. Wood Clark, clerk.

ASSIGNMENT OF ERRORS.

United States of America, defendant, and Interstate Commerce Commission, intervening defendant, now come, by their respective counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely on said appeal to the Supreme Court of the United States from the interlocutory order or decree of the district court, entered November 13, 1915, in the above-entitled cause.

The district court erred:

I.

In overruling the motion of the United States to dismiss the petition on the various grounds set forth in the said motion, and in not sustaining the said motion.

II.

In overruling the motion of the Interstate Commerce Commission to dismiss the petition on the various grounds set forth in the said motion, and in not sustaining the said motion.

III.

75 In granting the interlocutory injunction enjoining the order of the Interstate Commerce Commission entered May 11, 1915, on complaint of Pennsylvania Paraffine Works v. Pennsylvania Railroad Company, No. 5574, and The Crew-Levick Company v. Pennsylvania Railroad Company, No. 5574 (Sub. No. 1), and suspending the force and effect of the same, for that the petition of the complainant (a) does not set forth any cause of action and is insufficient to warrant the granting of the interlocutory injunction or to form the basis for any relief from the said order; (b) nor has the complainant shown that there is any equity in the said petition on which to grant the interlocutory injunction or to form the basis for any relief from the said order; (c) nor has the complainant shown that in making its said order the Interstate Commerce Commission acted beyond or without its jurisdiction or exceeded any

power or authority conferred on it by the act to regulate commerce; (d) nor has the complainant shown that in making its said order the Interstate Commerce Commission violated any right of the said complainant protected by the Constitution of the United States, or any other right of the said complainant over which this court may exercise jurisdiction.

IV.

In holding and adjudging that the Interstate Commerce Commission was and is without power and authority to enter the order in the case of Pennsylvania Paraffine Works v. Pennsylvania
76 Railroad Co., No. 5574, and The Crew-Levick Co. v. Pennsylvania Railroad Co., No. 5574 (Sub. No. 1), entered at a general session of the Interstate Commerce Commission at its office in Washington on the 11th day of May, A. D. 1915.

V.

In entering the following decree:

"That the application of the complainant for an interlocutory injunction be, and the same is hereby, granted, as prayed in the petition, and that an interlocutory injunction be, and the same is hereby, issued out of this court enjoining, annulling, and suspending the order of the Interstate Commerce Commission in the case of Pennsylvania Paraffine Works v. Pennsylvania Railroad Company, No. 5574, and the Crew-Levick Company v. Pennsylvania Railroad Company, No. 5574 (Sub. No. 1), entered at a general session of the Interstate Commerce Commission at its office in Washington, D. C., on the 11th day of May, A. D. 1915, and that the said defendants, and each of them, their officers, members, examiners, agents, and attorneys, and any and all persons whomsoever be enjoined and restrained from enforcing, or in any manner attempting to enforce or carry out, the said order or the terms thereof until the further order of the

VI.

In finding and deciding as follows:

"We find nothing in the original or amended act which, by express language, imposes upon a carrier the extraordinary duty or confers upon the Interstate Commerce Commission the extraordinary power claimed by the Government in this proceeding. If they exist, they can be found only by implication, and it is doubtful if Congress would leave to implication an intention to impose so onerous a duty and to grant so great a power."

VII.

In finding and deciding as follows:

"The carriers' duty to provide and furnish facilities of transportation is not absolute. The duty is laid upon them 'according

77 to their respective powers.' Such expressions rather raise the implication that Congress did not intend to place an absolute and unqualified duty upon carriers to furnish cars of a certain type whether they had them or not, and if they did not have them, then to acquire them whether they had the money or not. Restricting our construction of the act to its words, and finding nothing by implication that changes or qualifies their meaning, we are of opinion that the amendment of 1906, including cars within the definition of 'transportation,' added nothing to the original duty of the carrier as prescribed by the original act and as interpreted by the commission and vested in the commission no increase of power over cars as instrumentalities of shipment. If, under the act as amended, no different or greater duty is imposed upon a carrier with respect to furnishing and providing cars than was prescribed by the original act, then the practice of the carrier found unlawful in this case was not in violation of the statute, and the order of the commission directing the carrier to desist from that practice was an exercise of power not conferred by law."

VIII.

In finding and deciding as follows:

"We find nothing in the law which confers upon the commission power to compel a carrier to acquire facilities it does not possess or to acquire better facilities than those it possesses, not with the object of preventing discrimination and preferences, but in order that the shipper may have larger, better, and perhaps more economical facilities. We are of opinion that in making the order the Interstate Commerce Commission exceeded its statutory power, and that the order should be suspended and annulled in accordance with the prayer of the petition."

IX.

In finding and deciding that—

"in none of them (cases subsequently cited in the opinion) was the question raised or decided nor in any did the Supreme Court reveal its opinion as to whether there devolved upon a carrier a statutory duty to provide and furnish transportation of a type it did not possess, or to acquire such transportation in order to provide and furnish the same upon reasonable request."

X.

In not finding and deciding that it is plainly the duty of the carrier not only to furnish cars on reasonable request, but to fur-
78 nish cars reasonably suitable for the proper transportation of the freight to be shipped.

XI.

In not denying the application for interlocutory injunction and dismissing the petition.

Wherefore defendants and each of them pray that the said interlocutory order or decree of the district court, entered November 13, 1915, be reversed, annulled, and set aside, with directions that the petition be dismissed, and for such other and further order as may be appropriate.

E. LOWRY HUMES,
United States Attorney, Western District of Pennsylvania.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
JOS. W. FOLK,
Solicitor for Interstate Commerce Commission.

79 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, complainant,
v.
UNITED STATES OF AMERICA, DEFENDANT, AND Interstate Commerce Commission, intervening defendant.
In Equity. No. 38.

Filed Dec. 7th, 1915. J. Wood Clark, clerk.

PRÆCIPE FOR RECORD.

To the Clerk:

You will please prepare and certify a transcript of the entire record in the above-entitled cause to be filed in the office of the clerk of the Supreme Court of the United States, on the appeal from the interlocutory order or decree of the district court, entered November 13, 1915, and include in said transcript all of the pleadings, exhibits, notices, appearances, motions, orders, decrees, journal entries, appeal papers, and any other papers on file or of record in said cause.

E. LOWRY HUMES,
United States Attorney, Western District of Pennsylvania.
BLACKBURN ESTERLINE,
Special Assistant to the Attorney General.
JOS. W. FOLK,
Solicitor for Interstate Commerce Commission.

80 CITATION ON APPEAL.

UNITED STATES OF AMERICA, *ss:*

To the Pennsylvania Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to an appeal duly allowed and filed in the clerk's office of the United States District Court, Western District of Pennsylvania, wherein United States of America

and Interstate Commerce Commission are appellants and you are appellee to show cause, if any there be, why the interlocutory order or decree rendered against said appellants in the said appeal mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Charles T. Orr, United States District Judge, Western District of Pennsylvania, this 7th day of December, 1915.

CHAS. P. ORR,
United States District Judge,
Western District of Pennsylvania.

Service of a copy of the within citation is hereby admitted this 7th day of December, 1915.

HENRY WOLF BIKLE,
THOS. PATTERSON,
Solicitors for the Pennsylvania Railroad Company, Appellee.

81 In the District Court of the United States for the Western District of Pennsylvania.

THE PENNSYLVANIA RAILROAD COMPANY, complainant,
v.
UNITED STATES OF AMERICA, DEFENDANT, Interstate Commerce Commission and the Crew-Levick Company, a corporation, intervening defendants. } In Equity. No. 38.

Filed Dec. 14th, 1915. J. Wood Clark, clerk.

To the Honorable FRANCIS SHUNK BROWN,
Attorney General of the State of Pennsylvania.

You are hereby notified that the above-entitled cause was this day appealed to the Supreme Court of the United States and that the order allowing the appeal makes the same returnable within thirty (30) days from this date.

This notice is given you pursuant to chapter 32, at pages 220 and 221 of the statutes of the United States, passed at the 1st session of the 63d Congress, 1913.

December 7, 1915.

E. LOWRY HUMES,
United States Attorney, Western District of Pennsylvania.

I hereby acknowledge receipt of a copy of the above notice this date of December, A. D. 1915.

WM. M. HARGEST,
Deputy Attorney General of the State of Pennsylvania.

82 (Certificate of exemplification.)

In the District Court of the United States for the Western District of Pennsylvania.

PENNSYLVANIA RAILROAD COMPANY *vs.* UNITED STATES OF AMERICA. } No. 38. Nov. Term, 1915. In Equity.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, J. Wood Clark, clerk of the district court of the United States for the Western District of Pennsylvania, do hereby certify that the annexed and foregoing pages contain a true and correct copy of the record on appeal in the above-entitled case, so full and entire as the same remains of record and on file in my office, in the city of Pittsburgh, in said district.

In testimony whereof, I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, this 31st day of Dec., A. D. 1915.

J. WOOD CLARK, *Clerk.*

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, W. H. S. Thomson, district judge of the United States for said district, do hereby certify that J. Wood Clark, above named, was, at the time of making the above certificate, and is now, clerk of the said court, and that the said certificate made by him is in due form of law.

W. H. S. THOMSON,
U. S. District Judge.

Pittsburgh, Dec. 31st, 1915.

WESTERN DISTRICT OF PENNSYLVANIA, *ss:*

I, J. Wood Clark, clerk of the district court of the United States for the Western District of Pennsylvania, do certify that the Honorable W. H. S. Thomson, by whom the foregoing attestation was made, and who has thereunto subscribed his name, was, at the time of making thereof, and still is, judge of the district court of the United States in and for said district, duly commissioned and qualified; to all whose acts, as such, full faith and credit are and ought to be given, as well in the courts of judicature as elsewhere.

In testimony wherefore I have hereunto signed my name and affixed the seal of the said court, at Pittsburgh, in said district, this 31st day of Dec., A. D. 1915.

J. WOOD CLARK, *Clerk.*

83 CITATION OF APPEAL.

UNITED STATES OF AMERICA, *ss:*

To the Pennsylvania Railroad Company, greeting: You are hereby cited and admonished to be and appear at a Supreme Court

of the United States, at Washington, within thirty (30) days from the date hereof, pursuant to an appeal duly allowed and filed in the clerk's office of the United States District Court, Western District of Pennsylvania, wherein United States of America and Interstate Commerce Commission are appellants and you are appellee, to show cause, if any there be, why the interlocutory order or decree rendered against said appellants in the said appeal mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Charles P. Orr, United States district judge, Western District of Pennsylvania, this 7th day of December, 1915.

CHAS. P. ORR,
United States District Judge,
Western District of Pennsylvania.

Service of a copy of the within citation is hereby admitted this 7th day of December, 1915.

HENRY WOLF BIKLE,
THOS. PATTERSON,
Solicitors for the Pennsylvania Railroad Company, appellee.

(Indorsement on cover:) File No. 25073. W. Pennsylvania D. C. U. S. Term No. 790. The United States and Interstate Commerce Commission, appellants, vs. The Pennsylvania Railroad Company. Filed January 5th, 1916. Filed No. 25073.

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